

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**



74-1902

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**ORIGINAL**

In The

**United States Court of Appeals**

For The Second Circuit

MARIA IANUZZI,

*Plaintiff-Appellant,*

vs.

SOUTH AFRICAN MARINE CORP.,

*Defendant and Third Party Plaintiff-Appellee,*

vs.

INTERNATIONAL TERMINAL OPERATION CO., INC.,

*Third Party Defendant-Appellee-Appellant.*

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**JOINT APPENDIX**

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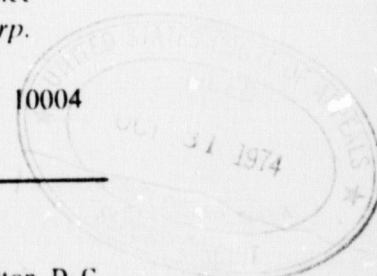
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1 Gpa 194

2 THE COURT: Ladies and gentlemen, we will  
3 recess until 2:10.

4 (L uncheon recess taken.)

5 \* \* \*

6 AFTERNOON SESSION

7 2:10 P.M.

8 (In open court.)

9 THE COURT: Mr. Cohen, you may proceed.

10 MR. COHEN: My next witness will be Dr. Di Maio,  
11 who was here this morning. He said he would be back at  
12 2:10, but I don't see him here yet.

13 THE COURT: Do you have anybody you can  
14 continue with while you are waiting for him?

15 MR. COHEN: He will be my last witness.

16 THE COURT: Come up to the bench, gentlemen,  
17 for a minute, if you will.

18 (Discussion off the record.)

19 MR. COHEN: May I call Dr. Di Maio, your  
20 Honor?

21 THE COURT: You may.

22 MR. LORY: Excuse me, your Honor, may I have  
23 my people leave the courtroom?

24 THE COURT: Yes, you may, if that's your  
25 desire.

1 rg39

2 DOMINIC DI MAIO, called as a witness by the  
3 third-party defendant, being first duly sworn, testified  
4 as follows:

5 DIRECT EXAMINATION

6 BY MR. COHEN:

7 Q Dr. DiMaio, are you a physician duly licensed to  
8 practice medicine in the State of New York?

9 A Yes.

10 Q Can you tell us what your training in medicine is.

11 A I am graduate of Marquette University School of  
12 Medicine 1939 with postgraduate study to be ceritifed as a  
13 specialist in anatomical, clinical and forensic pathology and-

14 Q I'm sorry, could you slow down a little bit. The  
15 words are very long.

16 A At the present I am acting chief medical examiner  
17 for the City of New York, consulting forensic pathologist  
18 for Kings County, Wyckoff and Maimonides Medical Center,  
19 consulting pathologist for Victory Memorial Hospital,  
20 professorial lecturer at Down State Medical Center, professor  
21 at Torrey College in pathology and NYU -- New York University  
22 School of Medicine.

23 Q You have used the term forensic pathologist. Is  
24 that your specialization or expertese?

25 A Yes.

Q

1 rg40

DiMaio-direct

2 Q Could you explain to the jury, please, what forensic  
3 pathology is.

4 A It is that science of medicine which deals with  
5 traumatic diseases rather than just the natural disease  
6 process, traumatic diseases being any one who dies as a  
7 result of a fall, a bullet wound, a stabbing or accidental,  
8 suicidal or homicidal purposes.

9 Q Forensic pathology does what in relationship to  
10 these accident cases?

11 A As a forensic pathologist for the City of New York,  
12 we are empowered to investigate all violent deaths, which  
13 include homicides, suicides and accidental deaths, suspicious  
14 sudden deaths and our purpose is not only to perform an  
15 autopsy to ascertain the cause of death, but also the manner  
16 in which the death occurred.

17 Q You are presently employed by the City of New York,  
18 are you not?

19 A Yes.

20 Q For how long have you been employed by the  
21 City of New York?

22 A Officially since 1959.

23 Q Today you are the chief medical examiner of New  
24 York County; is that correct?

25 A Of the entire city, yes.

1 rg41 DiMaio-direct

2 Q For the entire city. I am sorry.

3 For how long have you been the chief medical  
4 examiner of the city?

5 A Since January 1974.

6 Q Is that when Dr. Halperin retired? He was your  
7 predecessor?

8 A That is correct.

9 Q Before Dr. Halperin's retirement, what was your  
10 position in the medical examiner's office?

11 A I was deputy chief medical examiner in charge of  
12 the Borough of Brooklyn for 15 years.

13 Q Now, Doctor, did you perform an autopsy on Mario  
14 Iannuzzi on November 30, 1966?

15 A Yes. At Kings County Morgue.

16 Q Do you have your file with you relative to that  
17 autopsy?

18 A Yes.

19 Q Among the papers in the file, do you have a copy  
20 of your autopsy report?

21 A Yes.

22 Q Could you tell us, please, Doctor, what injuries  
23 you found on autopsy.

24 A There was evidence of surgical intervention, that  
25 is the deceased had had prior surgical intervention at a

1 rg42

DiMaio-direct

2 local hospital in Brooklyn. That was evident on his scalp  
3 as I indicate on my own.

4 There was a bur hole, which is a method of  
5 boring a hole through the skull so that you can examine the  
6 brain. That was on the right side.

7 On the left side there was what we call a hockey-  
8 stick incision. It is more or less of a semi-circular  
9 incision covering the left side of the scalp, as I just  
10 indicated on my own, and the purpose of that was to expose  
11 the underlying brain substance for corrective measures.

12 In this case they had partially evacuated a left  
13 subdural hematoma. The brain is covered by three sheaths.  
14 The subdural one is the one inbetween the outer second and  
15 third sheath of the brain.

16 Also the examination showed that there were mul-  
17 tiple contusions and superficial lacerations of the brain,  
18 contusions being equivalent to what you would call a black  
19 eye, that is a bruise. A laceration is when the structures  
20 or tissues or the skin is torn.

21 This also revealed small hemorrhages encircling  
22 the brain and there was evidence of what we call a  
23 comminuted skull fracture. A comminuted skull fracture  
24 means there are many breaks in the skull which cross --  
25 criss-cross each other and these were situated on the vertex,

1 rg43 DiMaio-direct

2 as I indicate on my own scalp, in the frontal region and  
3 in the parietal region, and these were seen to proceed down-  
4 ward on to the base of skull.

5 Q Doctor, if I may just interrupt you at this point  
6 for the sake of the record, the area on your head you have  
7 just pointed to to show to use where the fractures were,  
8 is that the top of the head in contrast to the back of the  
9 head?

10 A That is correct. That's what we call the vertex,  
11 or the top as you would call it.

12 Q The top of the head?

13 A Right.

14 Q And they extended from the midline on the top of  
15 the head over toward the right; is that what you mean?

16 A Down to the right side on to the base of the  
17 skull. If you can reca-1, the skull is a hollow sphere and  
18 if you notice my fingers meet in the midline, that's the  
19 midline of the skull, which would be here, and these  
20 fractures you can more or less compare them to my fingers,  
21 and they went down on to the base of the skull.

22 Q Doctor, did you find any evidence of fracture  
23 on the back of the head?

24 A No.

25 Q Did you find any evidence of any kind of a bruse

1 rg44 DiMaio-direct

2 or abrasion or a laceration on the back of the head?

3 A There was no laceration, but there was hemorrhage,  
4 but the hemorrhage could be attributed to the surgical  
5 procedure.

6 Q Other than the fracture s that you have described  
7 and their location on the head, did you find any other evidence  
8 of injury in any other part of Mr. Innuzzi's body?

9 A No, sir.

10 Q Is it part of your regular practice to examine  
11 the entire body on autopsy?

12 A Yes.

13 Q Did you examine the chest and the back and the  
14 arms and the legs of Mr. Iannuzzi?

15 A Yes.

16 Q Anywhere did you find any evidence of any injury  
17 in those parts of the body?

18 A No, sir.

19 Q Is it part of your official job, sir, to prepare  
20 a report of your autopsy findings?

21 A Yes.

22 Q Is that a record that must be made out by you in  
23 the regular course of your duties?

24 A Yes.

25 Q Is that then maintained by the City of New York

1 rg45 DiMaio-direct

2 as a record?

3 A Yes.

4 Q Do you have that report with you, sir?

5 A Yes.

6 Q May I see it, please.

7 A That's the original.

8 Q You have handed me five pages altogether. Does  
9 that comprise the entire file of the medical examiner's  
10 officer?

11 A Yes.

12 Q Are all five of these pages records that are  
13 kept and maintained by the medical examiner in the regular  
14 course of it's functions.

15 A Yes.

16 MR. COHEN: I would offer all of them in evidence,  
17 if Your Honor please.

18 THE COURT: I take it, Doctor, you will want to  
19 take this report back with you?

20 MR. COHEN: I think we all have copies, Your  
21 Honor.

22 MR. LORY: I do not, Judge.

23 THE COURT: Can we mark a conformed photocopy of  
24 these five sheets in any event?

25 MR. COHEN: Yes.

1 rg46

DiMaio-direct

2 MR. LORY: Your Honor, I do not object to the  
3 report, except for the conclusion at the bottom of it which  
4 is the last line.

5 THE COURT: For the moment, may we paper clip to  
6 this exhibit -- it is marked for identification AA for  
7 identification.

8 (Third-party Exhibit AA marked for identification.)

9 THE COURT: That one line, I take it, is the one  
10 line that you object to?

11 MR. LORY: Yes, sir.

12 THE COURT: Mr. Cohen, the objection would seem  
13 to be well taken at this point.

14 MR. COHEN: Let me then withdraw the offer for the  
15 moment, Your Honor, and lay a better foundation, if I may.

16 Q Did I understand correctly, Doctor, that part  
17 of the function of the medical examiner's office on autopsy  
18 is to see to it whether the findings that it makes are  
19 compatible with the cause of death or injury that has been  
20 given to it?

21 A That is correct.

22 Q When a body is received by the medical examiner's  
23 office, how do you know what the cause of accident or in-  
24 jury is; how are you informed?

25 A There are several ways. One--

rg47

DiMaio-direct

Q Let's confine ourselves to this case, if we may, then, Doctor.

A Yes.

Q In this case, how were you informed or advised as to how this death had come about?

MR. LORY: Objection, Your Honor. This would be hear say to the doctor.

MR. COHEN: I am asking for the method in which he is informed.

THE COURT: This is the method.

MR. LORY: All right.

A The method would be when the individual is hospitalized, the hospital is compelled to fill out a particular form which gives all the information relative to the deceased. The other method is by the kin, a friend, a member of the family, in other words, would come in and give us a story. It could be also a co-worker.

Q In this case, Doctor, do you have your file?

A He has it.

Q In this case, Doctor, in Mr. Iannuzzi's case, in what fashion did you and your office learn of how this accident occurred?

A From the Prospect Heights Division of Long Island College Hospital.

1 rg48

DiMaio-direct

2 Q You mean, then, that they filled out a required  
3 form that was sent to your office?

4 A That is correct.

5 Q What requires the hospital to fill out this form?

6 A It is the law.

7 Q In compliance with the law, do you receive that  
8 form and retain it in your file?

9 A Yes.

10 Q Is that a form that the hospital fills out in the  
11 regular course of hospital business?

12 A Yes.

13 Q Is that a record that is then delivered to the  
14 medical examiner's office and retained by your office in the  
15 regular course of its business?

16 A Yes.

17 Q As part of your job, is it necessary for you to  
18 examine that form in performing an autopsy?

19 A Yes.

20 Q Did you look at that form in connection with the  
21 autopsy you performed in this case?

22 A Yes.

23 Q Is that form one of the five pages --

24 A Yes.

25 Q That have been marked as Exhibit A1 for identifi-

1 rg49 DiMaio-direct

2 cation?

3 A Yes.

4 MR. COHEN: I wonder if we could pull that particula  
5 sheet out for the moment, Your Honor.

6 THE COURT: You want to mark it separately?

7 MR. COHEN: I think it might be better, yes, sir.

8 May we mark this as the next exhibit for identifi-  
9 cation?

10 \*\*\* THE COURT: Yes.

11 (Third-party defendant Exhibit BB marked for  
12 identification.)

13 Q Doctor DiMaio, this very sheet of paper which has  
14 been marked as Exhibit BB for identification, is that the  
15 original form sent to your office by Prospect Heights Hospital  
16 pursuant to law that you have just described?

17 A Yes.

18 Q This form has been retained in your file; this  
19 record has been retained in your file ever since you received  
20 it from the hospital; is that correct?

21 A Yes.

22 MR. COHEN: I would like to o-fer it in evidence,  
23 Your Honor.

24 MR. LORY: I would object to it, Your Honor. It  
25 is based upon conjecture and it so states.

1 rg50

DiMaio-direct

2

THE COURT: Let me see it.

3

No, I am going to sustain the objection to it.

4

MR. COHEN: May I respectfully except?

5

THE COURT: Yes.

6

MR. COHEN: May I inquire of Your Honor the basis

7

so I can cure the defect?

8

THE COURT: Yes.

9

MR. COHEN: May I approach the side bar?

10

THE COURT: Yes.

11

(At the side bar) .

12

THE COURT: The basis for my objection is that

13

you are offering it under the business entry rule and this

14

was not a business entry made by this office in the regular

15

course of business. Therefore, there is no -- it doesn't

16

come under the federal shop book rule.

17

The mere fact that he receives it and keeps it does

18

not make it something where it does not bring it within that

19

provision.

20

MR. COHEN: I don't want to argue with Your Honor,

21

but I believe he said that there is a law that requires the

22

hospital to make out a record like this and in compliance

23

with that law this record was made out; that the record

24

itself, Your Honor, says it is an official record of the New

25

York City government and it is received by him and then

1 rg51 DiMaio-direct

2 maintained by him.

3 I don't believe it is necessary, Your Honor, under  
4 the circumstances that the maker of the record be present  
5 where we have a witness who can testify from his own know-  
6 ledge that the law requires this type of record to be made  
7 out; that the hospital made it out and it was sent along to  
8 him in the regular course of their business and procedures.

9 I just don't see why this is not admissible and  
10 why Mr. Lory's objection, which only really goes to the  
11 history contained in it, isn't something that goes to the  
12 weight rather than the admissibility, as is true of every  
13 record.

14 In addition, I point out to Your Honor that we  
15 do have testimony from Andre that he went to the hospital  
16 and told them that he dropped some lumber on the head and  
17 that's the history that shows up there.

18 So I don't think there is any real prejudice  
19 to Mr. Lory from this coming in this way because Andre tes-  
20 tified that one of the reasons he went to the hospital was  
21 to tell the doctors how it happened.

22 I just don't understand why this shouldn't go in.

23 THE COURT: Because it is a hear say instrument  
24 of a Dr. Weinstein that is not capable of cross-examination.

25 MR. COHEN: But every hear say record is not cap-

1 rg52

DiMaio-direct

2 able of cross-examination.

3 THE COURT: Then at that point, Mr. Cohen under  
4 the shop book rule you atleast have somebody who can give  
5 testimony as to the manner of preparation; that it was kept  
6 in the regular course of business; when the entries were  
7 made; how soon they were made.

8 You have somebody from the making organization  
9 to testify to the practice of making and here you don't have  
10 anything. All you have this man saying is that he received  
11 this from Long Island.

12 MR. COHEN: Pursuant to law.

13 THE COURT: Pursuant to law. You don't have any  
14 testimony about the circumstances of when it was made; how  
15 it was made; whether they make one of these a year or whether  
16 they don't.

17 The statement that he is hit with lumber is  
18 obviously a hear say statement of somebody to the doctor.

19 MR. COHEN: Of course.

20 THE COURT: Then it would be inadmissible .

21 THE COURT: Mr. Andre already told us he went to  
22 the hospital and gave the history.

23 THE COURT: He didn't say what he gave. He just  
24 said he went to the hospital to tell them what happened.  
25 Nobody asked him what he said to them.

1 rg53

DiMaio-direct

2 MR. COHEN: But he told us what he said at the  
3 same time to the boatswain and the police officer.

4 THE COURT: I fear that I must exclude the exhibit.  
5 I will permit it as an exhibit for identification and the  
6 medical examiner here can say that having received such a  
7 communication he then made certain conclusions based on his  
8 observations.

9 MR. COHEN: Okay.

10 MR. KAIN: Before you continue with the exhibit,  
11 may I see the exhibit?

12 MR. COHEN: Yes.

13 (In the presence of the jury)

14 THE COURT: For the exhibit itself, as we spoke  
15 at the side bar, I sustain the objection.

16 Q Dr. DiMaio, this type of record, Exhibit BB for  
17 identification, is that utilized by you upon your autopsy to  
18 see whether or not the findings that you make are compatible  
19 with the description of the accident contained --

20 MR. LORY: Objection, Your Honor.

21 THE COURT: No, I will allow it. Go ahead.

22 A Yes.

23 Q Is it required of you in the making of an autopsy  
24 report that you give the cause of death and you indicate how  
25 it occurred?

1 rg54

DiMaio-direct

2 A Yes.

3 Q Did you do that in your autopsy report relative  
4 to Mr. Iannuzzi?

5 A Yes.

6 Q Do you have a section at the very end of your  
7 autopsy report "cuase of death"?

8 A Yes.

9 Q Could you read for us, please, everything that  
10 appears under that section?

11 MR. LORY: Objection.

12 THE COURT: No, I will sustain the objection to  
13 that. Either the exhibit is going to go in evidence or it  
14 isn't.

15 (To the witness) Doctor, I take it you personally  
16 examined Mr. Iannuzzi in the course of your official duties?

17 THE WITNESS: Yes. I performed the autopsy.

18 THE COURT: Without characterizing it, did you  
19 make a determination based upon your personal observation  
20 as to what kind of trauma caused the injuries which caused  
21 his death? Not necessarily what they were, but what kind of  
22 trauma.

23 In other words, if this had come into you without  
24 any explanation to you what so ever, could you reach a con-  
25 clusion that you could give with reasonable medical certainty

1 rg55

DiMaio-direct

2 as to what kind of an instrument or instruments caused the  
3 injury or whether this was a fall or -- you see the area  
4 where I am inquiring?

5 THE WITNESS: Yes. I would come to a conclusion  
6 so I could guide the investigating officer of the method in  
7 which -- that is the direction he should take to determine  
8 the exact impliment.

9 THE COURT: You were told here that this was not  
10 a felonious situation so you were not looking obviously for  
11 that.

12 THE WITNESS: No, sir.

13 THE COURT: But you were trying to make some  
14 determination as to how this occurred?

15 THE WITNESS: Right. In other words, I was trying  
16 to determine that the story they told me was compatible with  
17 that which I come to a conclusion of.

18 THE COURT: Gentlemen, come to the side bar  
19 again, if you will.

20 (At the side bar)

21 THE COURT: I think frankly I should leave this  
22 in your hands, but what I am getting at --

23 MR. COHEN: I thought you were doing it very well.  
24 I think it's his job, as he said, to find out if it's com-  
25 patible.

1 rg56

DiMaio-direct

2 THE COURT: What I had in mind to ask him is that  
3 there are two hypothetical fact situations that have been  
4 adduced in this court room. One is that the man was knocked  
5 down into the hatch below by being struck in the rear by a  
6 car as it was moving across the deck and the other aspect as  
7 to which there is support in the record is that in some  
8 manner a piece of lumber struck him on the top of the head.

9 Now, could he tell us with reasonable medical  
10 certainty whether his findings fit one or the other? It  
11 seems to me that that's where you can go.

12 MR. LORY: I think it would be for either pattern,  
13 not one or the other.

14 THE COURT: For either.

15 MR. COHEN: I think before we go to the hypothetical  
16 I think I should have the right, especially in view of Your  
17 Honor's last ruling -- I now have the man in court, on the  
18 stand, who performed the autopsy and made out the report in  
19 the regular course of his duties and if it is part of his  
20 job to advise the government whether or not his findings are  
21 compatible with a certain description of the accident --

22 THE COURT: It's the leg up with the description  
23 of the accident that troubles me because he might very well  
24 say if he didn't have a description of the accident that the  
25 man had been hit in the head with the blunt end of a hatchet.

1 rg57

DiMaio-direct

2 Who knows that the man might have hit a rail, but on the  
3 other hand to be fair, since this is the man who made this  
4 and has his description of the accident, it is fair for him  
5 to say is your finding compatible today with this man being  
6 struck on the head with lumber or is your finding compatible  
7 with a man being hit in the back of the head and knocked  
8 down into the hole and in some way falling and injuring his  
9 head.

10 MR. COHEN: Judge, what you are saying is perfectly  
11 right and makes sense, but I think I do have the right to  
12 produce this witness who introduced this record, which is  
13 not only a regular record but a government record to go into  
14 evidence.

15 THE COURT: But this is the heart of the case  
16 of how this accident happened and there is a very sharp  
17 issue of fact raised. I do not feel that it is proper  
18 evidence for the jury to consider that some Dr. Weinstein  
19 in the hospital has written down that he was hit by a load  
20 of lumber because that's absolutely sheer hearsay based  
21 upon maybe two or three hands.

22 Somebody may have told Dr. X who told Dr. Y who  
23 told Dr. Weinstein who put it in a record he makes to the  
24 medical examiner and there it sits and the jury can then  
25 consider that that is a statement of fact. It is not a

1 rg58

DiMaio-direct

2 statement of fact. It is his statement of what he has been  
3 told.

4 I feel that it is inappropriate to let that in as  
5 evidence of that fact.

6 MR. COHEN: Judge, in the last two weeks I have  
7 grown to have a great deal of respect for you and I don't  
8 mean to argue with you, but I have to disagree with you  
9 strongly at this point.

10 Every record that comes in under the shop book  
11 rule as a government record is hear say and all you really  
12 need is a clerk who never saw it being made out, who doesn't  
13 know how it is made out, just to identify it that it is a  
14 record made in the regular course of business.

15 You don't have to have the maker of the record or  
16 have the circumstances under hwich it was made. All the  
17 arguements that may be made in relation to that record go  
18 into it's admissibility.

19 THE COURT: Absolutely.

20 MR. COHEN: And that's true, they are all hear  
21 say. Every record that goes in is hear say.

22 THE COURT: That is also true, but are you saying  
23 that this witness is competent to say "I know how this record  
24 was prepared by the Long Island hospital"?

25 MR. COHEN: Let's stay with his autopsy report for

rg59

DiMaio-direct

a moment. In so far as his own autopsy report and his own official duties are concerned, he is competent to testify as to what he received and what he did and what he wrote down and his report should go into evidence in toto.

Now, if Mr. Lory wants to attack its weight by saying you personally didn't see how the accident happened and you got this from somebody else who may have gotten it to somebody else, that goes to weight. That is the objection he has really. It is hear say, but that kind of hear say is allowed under the shop book rule.

MR. LORY: Your Honor, may I just bring up one point?

THE COURT: Yes.

MR. LORY: The doctor's function as a medical examiner is to determine primarily whether there is a felony committed; whether there was a felonious assault and to recommend if further action is to be taken. In this case the first examination he has got to make is that there was no felony. If it is not felonious, then whatever his conclusion is is not required by statute. It is not required by his function. All he has to do is set forth the cause of death.

THE COURT: I will tell you what I think I am going to do. Without getting into that exhibit I will permit you

1 rg60

DiMaio-direct

2 to ask the doctor whether or not he received information  
3 that this man had been struck in the head by a piece of  
4 falling lumber.

5 MR. COHEN: Okay.

6 THE COURT: I will instruct the jury in connection  
7 with your question that that is not being admitted as proof  
8 of the fact; it is being admitted only as proof of what the  
9 man was told so he can go about his function. Then you may  
10 then put the next question.

11 I think I will exclude the exhibit, but I will  
12 permit you to ask him what he was informed so he could  
13 perform his duties that the man was hit in the head by a  
14 piece of lumber.

15 MR. LORY: Your Honor, I would take exception  
16 even to this because his function was to determine whether  
17 there was a felony and further police action was in order.  
18 Once he has this --

19 THE COURT: Yes, Mr. Lory, but this man's function  
20 is to determine cause of death and part of his duties is to  
21 determine how a man died and to make a study to ascertain  
22 that fact and to try to put the pieces together to come  
23 to a conclusion.

24 One of the pieces he has here is a starting  
25 point, right or wrong?

rg61

DiMaio-direct

I think it would be appropriate, if you wish to do so, to cross-examine him as to whether the injuries he found are compatible with being knocked into the hold by a car striking him on the back. That is certainly open to you, but I think that Mr. Cohen has a point, that the man should be permitted to testify to what he did in the course of his duties.

I still am troubled by the admissibility of that exhibit, but I think he should be permitted to say "I received this information from the Long Island hospital and I made a study to determine whether the injury was compatible with it as I am required to do in the course of my duties."

MR. LORY: I still believe it would be prejudicial for this particular reason: There has been a thought suggestion made to the figures and on this particular basis, depending upon the pressure of his work, either to reject it or accept it and we don't know this.

THE COURT: Mr. Andre did say that he told a couple of people that it was falling lumber and he has said that he went to the hospital and I think that is enough to permit the doctor to say "I was told that. Right or wrong, I was told that and that was the starting point for my inquiry."

Then you may cross-examine to ascertain whether the injuries that he found on his autopsy are consistent with any other theory or whether they are limited to that

1 rg62

DiMaio-direct

2 theory.

3 MR. KAIN: I take it the doctor's answer is going  
4 to be a yes or now as to whether he was told this.

5 THE COURT: Yes. Just limit it to were you  
6 informed --

7 MR. COHEN: Did you receive information --

8 THE COURT: Were you informed in writing that  
9 this had been caused by a piece of falling lumber?

10 MR. COHEN: Okay.

11 THE COURT: Okay?

12 MR. LORY: I am still troubled by it.

13 (In the presence of the jury)

14 Q Dr. DiMaio, in connection with the autopsy of  
15 Mr. Iannuzzi, had you been informed that his accident was  
16 caused by his being struck on the head by some falling  
17 lumber?

18 A Yes.

19 THE COURT: Ladies and gentlemen, in connection  
20 with this answer, the doctor, who is a medical examiner for  
21 the City of New York, was informed of this fact. The fact  
22 that somebody told him this is not admitted for the purpose  
23 of the truth of the matter. It is merely admitted in order  
24 that the doctor will, in the course of his duties to ascertain  
25 the cause of death, have a starting point from which he can

1 rg63 DiMaio-direct

2 commence his autopsy.

3 The fact that he was told this by someone at  
4 the Long Island hospital is no proof of the fact what so  
5 ever and it is not to be considered by you as proof of the  
6 fact what so ever.

7 You are merely to consider that as a statement  
8 to him for the starting point for his autopsy.

9 MR. COHEN: May I, Your Honor, now ask the doctor  
10 the source of that information?

11 THE COURT: Yes, you may.

12 Q Did that information come to you in that record,  
13 Exhibit BB for identification?

14 A Yes.

15 THE COURT: It was furnished to you by a doctor  
16 at the Long Island hospital?

17 THE WITNESS: Yes, Your Honor.

18 THE COURT: According to law as you have earlier  
19 described it?

20 THE WITNESS: Yes, sir.

21 THE COURT: Go ahead.

22 MR. COHEN: May I reoffer that exhibit, Your Honor?

23 THE COURT: No.

24 Q Doctor, did you come to a conclusion as to whether  
25 or not the injuries that you found on autopsy were compatible

1 rg64 DiMaio-direct

2 with the history of Mr. Iannuzzi having been struck on the

3 head by some lumber?

4 A Yes.

5 Q Were your findings compatible with an accident

6 of that description?

7 A Yes. It was my opinion after performing the

8 autopsy that it was compatible with lumber falling on top

9 of his head and giving the injuries I found.

10 Q Did you so indicate in your autopsy report?

11 A Yes.

12 MR. LORY: Objection. It becomes immaterial.

13 THE COURT: Yes. I will strike out the answer.

14 The doctor has given it as his opinion that it was the fact.

15 Q Was it part of your duty to so indicate its

16 compatibility in your autopsy report?

17 A Yes.

18 MR. COHEN: Now I would like to offer the autopsy

19 report in toto, Your Honor.

20 THE COURT: Let me see it.

21 MR. COHEN: Your Honor, I believe the autopsy

22 report itself is just two pages.

23 THE COURT: Doctor, in this report, which is

24 Exhibit BB for identification, you have a statement of fact

25 in the very last line, do you not? Just answer yes or no.

rg65

DiMaio-direct

THE WITNESS: Yes, Your Honor.

THE COURT: Now, that statement of fact is, in effect, a shorthand way of saying that your conclusion was that your findings were compatible with what you were told?

THE WITNESS: Yes, Your Honor.

THE COURT: You did not intend that language to mean that that is in fact, to your knowledge, what happened, but that merely given what you were told, the injury was compatible with that state of facts; is that right?

THE WITNESS: That is correct.

THE COURT: With that testimony, and I will explain that further to the jury when the exhibit is in evidence, I will admit the exhibit in evidence.

MR. LORY: May I have my exception, Your Honor?

THE COURT: You may.

(Third-party defendant Exhibit AA received in evidence.)

THE COURT: Now that it is in evidence, may I contemporaneously with its admission observe to the jury what I have just conversed with you about.

MR. COHEN: Absolutely, sir.

THE COURT: This is the medical examiner's report, ladies and gentlemen. I am not going to get into any aspect of it, except to say that the very last line on

1 rg66

DiMaio-direct

2 the second page reads "struck over head by lumber while on  
3 deck of ship 1/24/68."

4 Now, the doctor has just testified that what  
5 is meant by that is not a finding of fact that that happend  
6 and you are not to conclude from the fact that that is in  
7 this report that that is what happened, but it is his short-  
8 hand way of saying tha having been given the information  
9 which I discussed with you before, he found that the injuries  
10 he discovered on his autopsy were consistent with that  
11 event having taken place.

12 Whether or not that event took place is a matter  
13 for you as the jury to decide on the competent evidence  
14 with regard to what happened around hatch number 3 on that  
15 day and you are not to consider in any way the fact that the  
16 doctor has put this in his medical report as being any  
17 proof of that fact what so ever, except to the extent that  
18 he says the injuries are compatible with the happening in  
19 that fashion.

20 MR. COHEN: Thank you, Your Honor.

21 Q Doctor, I am going to ask you a rather long and  
22 perhaps complicated question, so if you don't understand  
23 any part of it interrupt me in the middle, if you would,  
24 please.

25 I would like you to assume, doctor, that this

1 rg67

DiMaio-direct

2 model here -- do you have any familiarity with ships?

3 A Somewhat.

4 Q Okay. I would like you to assume that this model  
5 is a model of the forward portion of a hatch on a cargo  
6 ship; all right?

7 A Yes.

8 Q And I would like you to assume that a man is  
9 standing at the coaming. This is the railing that sort of  
10 goes around the open square of the hatch; okay?

11 A Yes.

12 Q Assume that a man is standing at the coaming of  
13 the open hatch, and I would like you to further assume that  
14 the ship's rail is approximately 25 or 27 feet away from  
15 the coaming where the man is standing. All right so far?

16 A Yes.

17 Q I would like you further to assume that the man  
18 is standing at the coaming with his back to the railing,  
19 and perhaps slightly bent over so that he is looking down  
20 below or talking to someone down below, but he is in a some-  
21 what stooped over position. All right?

22 I would like you to further assume that as the  
23 man is in that position a heavy automobile is being raised  
24 up from the dock and comes across the ship's rail at a  
25 height of approximately five or six feet above the rail,

1 rg68

DiMaio-direct

2 and that at that point -- just assume all these things.

3 At that point the winch that's controlling the  
4 lifting of that draft and its movement goes out of control  
5 and that heavy car suddenly starts an uncontrolled swooping  
6 downward and across and strikes that man in the back of the  
7 head, in the neck, in the shoulder area or in the low back.

8 Would you, on the basis of your many years of  
9 experience as a forensic pathologist, expect that if a man  
10 in such a position were struck by a heavy car in that kind  
11 of an uncontrolled downward and swooping motion, that his  
12 body would show some evidence of the impact to the back of  
13 his head, neck, shoulders or low back by the car?

14 MR. LORY: Objection, Your Honor.

15 THE COURT: On what ground?

16 MR. LORY: On the ground that we don't know, and  
17 this record does not show, the strength or the force behind  
18 the blow. In Mr. Iannuzzi's position, as the record does  
19 show, he could have been brushed into the hatch. The hema-  
20 toma -- I will get into that later.

21 He could have been brushed into the hatch. The  
22 blow could have been slight. The way Mr. Cohen phrased  
23 the question we have his whole back being struck. We have  
24 various area of his back being struck. We have nothing to  
25 support this.

rg69

DiMaio-direct

MR. COHEN: If Your Honor please, I phrased my hypothetical as best I could given the testimony by Mr. Lory's own witnesses and I tried not to omit what they said and I tried to include all that they said.

Your Honor will recall that his witnesses gave testimony, one to the effect that the point of impact was the back of the head, the neck and the shoulders, and another one of Mr. Lory's own witnesses says he was struck about the low back, so I have included all portions of the anatomy that his own witnesses referred to in their testimony.

THE COURT: Doctor, I would think that the testimony here is that in some manner the movement of this car that you heard described catapulted or knocked Mr. Iannuzzi into the hatch. Can we assume that before that would happen the blow would have to have some force that would leave a mark upon the body?

THE WITNESS: In the method he described in a car that is swinging, and the average car weighs a couple of thousand pounds --

THE COURT: This was 4,000, 4,500.

THE WITNESS: You would have to leave not only injuries in the back, but if he would only describe it a wee bit further, the height of the rail --

MR. COHEN: The rail was 4'2" high, doctor.

1 rg70

DiMaio-direct

2 THE WITNESS: He should show injuries also in  
3 front of the body because he would be crushed between a  
4 resisting wall and an impact from the back.

5 THE COURT: I overrule the objection.

6 MR. LORY: I renew the objection, Your Honor.  
7 He has got Mr. Iannuzzi squeezed between the coaming and  
8 the car.

9 THE COURT: Deal with that, Mr. Cohen, if you  
10 would in your questions, please.

11 MR. COHEN: May I do it in my way, Your Honor?

12 THE COURT: Yes.

13 Q Did you, doctor, in the course of your autopsy,  
14 check out Mr. Iannuzzi's chest and back to see if there  
15 were any signs of injury?

16 A Yes, I did.

17 Q I believe you told us before that having checked  
18 out those parts of his body you found no evidence of  
19 any injury?

20 A No injuries.

21 Q Would you, doctor, again based upon your experience  
22 as a forensic pathologist -- by the way, how tall was Mr.  
23 Iannuzzi; is that in your autopsy report?

24 A 5'7".

25 Q Based upon your experience as a forensic pathologis

1 rg71

DiMaio-direct

2 would you expect that if a man of 5'7" is leaning against  
3 a coaming that is 4'2" in height and is bent over somewhat  
4 so that he is looking down to or talking with somebody in  
5 the deck below, would you expect that if such a man is struck  
6 by a vehicle in the fashion I indicated to you earlier,  
7 that that would result in some injury to the chest?

8 A Yes.

9 Q Can you explain to the jury why if the man is  
10 struck while in that position by a vehicle from behind you  
11 would expect, as a forensic pathologist with years of  
12 experience, you would expect to find some injury to the  
13 chest?

14 A Well, if he, as you say, was leaning over and  
15 the impact is in the back, as you state it, he would be  
16 crushed up against the railing so that the big force behind  
17 him swinging in an arc would crush his chest.

18 MR. LORY: If Your Honor please, I move to strike  
19 the doctor's opinion. Well now, as I said before, Mr. Cohen  
20 and his hypothetical has got him crushed between the rail  
21 and the car and I would request an instruction to the jury  
22 with respect to this testimony.

23 THE COURT: Yes, I will strike that testimony  
24 because there is no proof that he was crushed between the  
25 top of the coaming and the car, but I think it could be

1 rg72 DiMaio-direct  
2 profitably explored as to whether there would be injuries  
3 on the back because that's where he in fact -- we know  
4 that, the testimony supports it.

5 Q Would you under those circumstances that I  
6 described, doctor, a man again in that position and again  
7 a vehicle swinging, as I said before without repeating it  
8 at length, would you expect to find injuries in the back  
9 where the man was struck by this vehicle?

10 A Yes.

11 Q Did you find any such injuries on Mr. Iannuzzi's  
12 body?

13 A No.

14 Q The fact that you found no evidence of such  
15 injuries, would that allow you to draw the inference --  
16 would it be fair and proper for you to draw the inference  
17 that he was not struck on the back by such a moving vehicle?

18 MR. LORY: Objection, Your Honor.

19 THE COURT: I will sustain the objection to that.  
20 The testimony is in the record that he would expect to find  
21 such given your hypothetical and that he found none.

22 I think the record has been made.

23 MR. COHEN: I didn't get Your Honor's last few  
24 words.

25 THE COURT: I said that you elicited that he

1 rg73

DiMaio-direct

2 that he would expect to find such injuries and that he  
3 didn't find any. I think the ultimate conclusion for that  
4 is for the jury.

5 MR. COHEN: I guess I have no other questions,  
6 then.

7 THE COURT: Mr. Lory, do you want a minute or  
8 two before you examine?

9 MR. LORY: Yes, please. I would like to look at  
10 the autopsy report.

11 THE COURT: Ladies and gentlemen, we will take  
12 a five minute recess.

13 (recess)

14 MR. COHEN: Your Honor, I neglected to ask one  
15 question, if I may.

16 THE COURT: Go ahead.

17 Q Doctor, is it fair to say that the location of  
18 the fracture on the top of the head shows the point where  
19 the impact was sustained?

20 MR. LORY: Objection, Your Honor.

21 THE COURT: On what ground?

22 MR. LORY: As to the form.

23 THE COURT: Sustained as to form.

24 Q Doctor, in your opinion does the location of the  
25 fracture show where the impact or trauma was received?

rg74

DiMaio-direct

1

2

A On the top of the head.

3

Q Does it do that?

4

A Yes.

5

6

Q So that the presence of the fracture site on the top of the head, if I understand you correctly, means that the trauma was received by Mr. Iannuzzi on the top of the head?

7

8

9

A That is correct.

10

MR. COHEN: Thank you, doctor.

11

12

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## CROSS EXAMINATION

BY MR. LORY:

Q Doctor, you are here pursuant to a subpoena?

A Yes.

Q When did you receive that subpoena, sir?

A April 17, subject to telephone call.

Q Since that time have you had occasion to confer with Mr. Cohen?

A I did confer with him. I couldn't remember the exact date. Maybe he will.

Q Can you tell us where that took place?

A In my office.

Q In your office.

How long a period of time did that conference take?

A I don't know. The exact time I don't know.

Q Well, your best approximation, doctor.

A A half hour or so, more or less. I don't know.

Q At that time did Mr. Cohen tell you what he thought happened in this particular case?

A Yes, he did. He described the circumstances.

Q He described the circumstances to you?

A That's correct.

1  
2 Q Was there any further discussion with  
3 respect to your appearance in Court?

4 A They informed me that I would have to appear  
5 in Court, yes.

6 Q Doctor, did you tell us that you found a  
7 hemorrhage on the back of Mr. Iannuzzi's head?

8 A No.

9 Q Which I believe you stated could be a tribunal  
10 to surgery?

11 A No. I said there was hemorrhage throughout  
12 the entire scalp region, yes.

13 Q Could that hemorrhage also indicate that  
14 a blow had taken place in that particular area?

15 A It's possible.

16 Q By reason of the hemorrhage that you found,  
17 could that blow have resulted in unconsciousness?

18 A I beg your pardon?

19 Q By reason of the hemorrhage that you found  
20 in the back of the head, did that indicate a blow of  
21 such severity as to cause unconsciousness?

22 A Not that I could determine.

23 Q Could you determine with any reasonable  
24 certainty?  
25

Gpa 197

DiMaio-cross

1

2

A No, I couldn't.

3

Q Now, doctor, you were asked to assume

4

Mr. Iannuzzi in a given position, isn't that so, with

5

respect to the hypothetical given to you by Mr. Cohen.

6

A That is correct.

7

Q I believe you told us that while you

8

would expect to find some physical markings on the body

9

of Mr. Iannuzzi, you found none; is that so?

10

A That is correct.

11

Q Wouldn't the presence of markings on the body

12

be determined by the object that caused the trauma; the

13

object that came into contact with his body?

14

A In what way?

15

Q Well, if I am struck by a piece of steel,

16

I would expect to see something; if I am struck by

17

something that is of a lesser consistency, for example,

18

rubber, I might not see something as much as that;

19

isn't that true, doctor?

20

A Not the way it was described. It was "

21

described that the car was moving in an arc and that

22

type of injury would leave some sort of an impact on

23

the body.

24

Q Well, doctor, forget for the moment what

25

you were told and how it was described to you.

1  
2 A That's right.

3 Q Would you not expect to find an indication  
4 of a trauma if you were struck by a hard object more so  
5 than you would if you were struck by another object of  
6 lesser density?

7 MR. COHEN: If your Honor please, I have to  
8 object to this. Mr. Lory asked the doctor to forget  
9 the facts that I gave him in the hypothetical when the  
10 only fact testimony from his witness in this case is to  
11 the effect that this car traveled in a downward arc.  
12 He is now trying to dredge up some other form of  
13 hypothetical, which obviously is not even based on the  
14 testimony of his own witnesses.

15 THE COURT: This is cross examination. I  
16 think I would permit him to explore the doctor's  
17 knowledge as to different natures of impact in a matter  
18 of background exploration.

19 MR. COHEN: All I am suggesting, sir, is  
20 that he be compelled to be consistent with the facts of  
21 this case, at least as testified to by his own witnesses.  
22 They all talked about this car traveling in an arc, not  
23 a straight, horizontal line.

24 MR. LORY: If your Honor please --

25 THE COURT: I will overrule the objection

1 Gpa 199

DiMaio-cross

2 at this point. Go ahead, sir.

3 THE WITNESS: Would you read the question  
4 back, please.

5 MR. LORY: Thank you, doctor.

6 (Question read.)

7 A Are you mentioning size there or are you just  
8 comparing two objects of the same size of greater density?

9 Q Let's say two objects of equal size.

10 A Well, if the other one is of greater density,  
11 then you would expect greater injuries, yes.

12 Q Now, doctor, could the injuries that you  
13 found with respect to the fractures and as you have  
14 described them to us have been caused by a fall directly  
15 on his head?

16 A Yes.

17 Q Assume, doctor, as Mr. Cohen described to  
18 you all the facts that he gave you, and assume further --  
19 doctor, you will have to watch me -- that Mr. Iannuzzi  
20 was in this position over the hatch coaming. Could  
21 a blow on the buttocks or a brushing on the buttocks --

22 MR. COHEN: Objection. There has been no  
23 testimony by anybody that he was struck on the buttocks.

24 THE COURT: I think that is true.

25 MR. LORY: I am not quarreling with that,

Gpa 200

DiMaio-cross

your Honor.

MR. COHEN: If he is not quarreling with it, then I object to him posing a hypothetical like that.

THE COURT: Yes, I would sustain that objection.

Q Assume a man in that position and assume that he is struck and we don't have any testimony in the record except the fact that he was struck by this vehicle --

MR. COHEN: I object to that statement by Mr. Lory. His own witnesses gave testimony as to where he was struck. He can't run away from that now by saying we don't have any testimony in this record when everybody heard what his witnesses testified to.

M R. LORY: If your Honor please, with respect to the description that was given as to the trauma, we have an object that is moving in an arc; you have Mr. Garofalo who is down in the hatch who says the vehicle struck him, and specifically he mentions the wheel. With respect to Mr. Scotto, he merely said he was struck by the car.

Now, Mr. Cohen is trying on the basis of what was found five days later to establish in this Court that there was no trauma to the person that

precipitated his diving into that particular hatch.

THE COURT: And?

MR. LORY: In this respect, your Honor, we don't know, and we cannot know specifically, what nudged Mr. Iannuzzi to take a headlong dive into that hatch.

THE COURT: I think we assume as a matter of common sense that if the accident happened as Mr. Scotto or Mr. Garofalo testified, that something hit him somewhere between the head and the lower back.

MR. LORY: If your Honor please, their description would also include a brushing of the body in order to precipitate it.

MR. COHEN: Judge, these were his witnesses and he never developed that from him and now he brings these adjectives and descriptive terms into play. We all heard the witnesses directly. They didn't talk about that.

THE COURT: Yes. I sustain the objection to the use of the word brushing.

Q Doctor, you were aware at the time that you conducted your autopsy that the autopsy was conducted five days following the initial trauma?

A Yes.

1  
2 Q When did you conduct the autopsy, was it  
3 five days or more than five days?

4 A The autopsy was on the 30th and I believe he  
5 died on the 29th.

6 Q Would the effect of medication and treatment  
7 given him at the hospital have altered his physical  
8 appearance in whatever way you found the body?

9 MR. COHEN: Just a minute. There has been  
10 no testimony in this case that Mr. Iannuzzi was given any  
11 medical treatment or attention in the hospital for any injuries  
12 to the back of the head, the neck or the low back.

13 MR. LORY: The question wasn't directed  
14 to this.

15 MR. COHEN: That's the subject we are talking  
16 about.

17 MR. LORY: That's the subject you are talking  
18 about, Mr. Cohen.

19 Forgive me, Mr. Cohen. I don't mean to  
20 argue with counsel.

21 THE COURT: I will allow it. Go ahead.

22 THE WITNESS: Would you repeat that question?

23 THE COURT: Read the question back, please.

24 (Question read.)

25 A I previously mentioned that he had hemorrhaged

1 over the entire scalp and at that point it would be  
2 difficult to ascertain whether there was any hemorrhage  
3 in any particular area previous to that which could  
4 not have been altered by the surgical procedure. That's  
5 all.  
6

7 Q How about the rest of the body?

8 A There was no reason for it.

9 Q A hematoma is a black and blue mark, is it  
10 not?

11 A That would not disappear in five days.

12 Q Wouldn't that depend upon the severity?

13 A Regardless of the severity, if you did have  
14 a hematoma, it would be more obvious because it would  
15 undergo a color change with the passage of five days.

16 Q But you found no hematoma whatsoever?

17 A None.

18 Q Did you find any sign of contusions?

19 A None.

20 Q To any part of the body?

21 A None.

22 Q Doctor, there were comminuted skull  
23 fractures both at the top and frontal and par  
24 regions of the skull; is that so?

25 A That is correct.

1  
2 Q Did this indicate to you one blow or more  
3 than one blow?

4 A It's not incompatible with one blow.

5 Q Is it incompatible with more than one blow?

6 A It could be.

7 Q If as you have concluded based upon what you  
8 have told us so far that Mr. Iannuzzi's injuries were  
9 solely by a blow to the top of the head, that would  
10 indicate one blow, would it not?

11 A Yes, but you can't exclude two blows.

12 Q You can't exclude two blows?

13 A No.

14 Q Would a fall on the top of his head be just  
15 as conducive to the bringing about of the injuries that  
16 you found as would the mere falling of a piece of lumber  
17 on his head?

18 A I said yes before.

19 Q Doctor, with respect to the possibility of  
20 two blows to the head, was either one of those blows --  
21 or can you say with any certainty as to whether either  
22 of those blows might have caused unconsciousness?

23 MR. COHEN: I am not sure what two blows  
24 we are talking about.

25 THE COURT: Yes. I think the doctor's

1 testimony as to two blows is purely conjecture at this  
2  
3 point.

4 THE WITNESS: He raised the question and I  
5 said it's possible.

6 Q All right, assume that point.

7 MR. COHEN: I don't think he should be asked  
8 to assume things that aren't in this record.

9 THE COURT: Let's see how the question ends up.  
10 Go ahead, Mr. Lory.

11 Q Would either of those blows have resulted in  
12 unconsciousness?

13 MR. COHEN: That's a question you can't  
14 really follow.

15 THE COURT: Doctor, is that a question that  
16 you could answer with any degree of medical assurance?

17 THE WITNESS: If I would be permitted a leeway  
18 on my assumption, yes.

19 THE COURT: All right.

20 THE WITNESS: In other words, assuming he  
21 received the blow on the front and sustained the  
22 fracture of the scull with an underlying brain injury,  
23 that could precipitate unconsciousness and it doesn't  
24 necessarily have to happen.

25 THE COURT: Even that assumes that there were

1 Gpa 206

2 two and you cannot say whether there were two or not.

3 THE WITNESS: No.

4 THE COURT: All right.

5 Q Did you have the benefit of Dr. Cook's report  
6 with respect to the papers sent to you by the hospital?

7 A No, sir. The only report I have is this one  
8 from Prospect Heights Hospital, and there is a notation  
9 of a surgical procedure. Who performed it I do not know.

10 Q Were you told as to whether Prospect Heights  
11 Hospital was the hospital where at the surgical procedures  
12 took place?

13 A From the report and knowing the hospital  
14 I would have to assume that.

15 Q Would you change your mind, doctor, after --

16 MR. KAIN: You better mark it.

17 MR. LORY: Mark it for identification, please.

18 (Plaintiff's Exhibit 18 marked for  
19 identification.)

20 A Do you have any particular page or do you  
21 want me to --

22 MR. COHEN: Is there a question to this  
23 doctor?

24 Q Doctor, will you alter your testimony or  
25 change your testimony in any way if that record shows

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1 to you that that surgery was performed at Long Island  
2 College Hospital?

3  
4 MR. COHEN: It's part of it.

5 A It's the neurosurgical section of the Long  
6 Island College Hospital.

7 MR. LORY: I profess my ignorance. I withdraw  
8 the offer.

9 Q So I understand correctly, doctor, while  
10 Mr. Iannuzzi was at the hospital for a period of five  
11 days, he having sustained trauma on November 24th and  
12 having expired on November 24th, the only thing the  
13 hospital sent to you was a one-page report with respect  
14 to whatever procedures had taken place at the hospital?

15 MR. COHEN: Identified in this record as  
16 Exhibit BB for identification.

17 THE COURT: Correct.

18 A Yes.

19 Q And it wasn't important to you to look at the  
20 other items in the hospital record in order to come to  
21 a conclusion as to cause of the death?

22 A The primary purpose of this report is to  
23 give us a summary of which the doctors feel is pertinent  
24 to my investigation and that appeared to be sufficient.

25 Q That summary is taken at random; is that correct?

Gpa 208

A I can't answer that question.

MR. LORY: I have nothing further of the doctor.

MR. COHEN: In view of the last few questions by Mr. Lory relative to Exhibit BB for identification, I now renew my offer of that exhibit in evidence, if your Honor please.

MR. LORY: And I object to it, your Honor, for the reasons heretofore stated.

THE COURT: It may be admitted.

MR. LORY: There are items here, your Honor, that cannot be admitted.

MR. COHEN: I am talking about BB for identification.

(Third-Party Defendant Exhibit BB received in evidence.)

MR. COHEN: Just one question.

REDIRECT EXAMINATION

BY MR. COHEN:

Q Dr. DiMaio, you performed your autopsy report listing your findings and conclusions years before you ever saw me in this case, isn't that true?

A That is correct.

MR. COHEN: Thank you.

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THE COURT: Any further questions?

MR. KAIN: No.

THE COURT: Doctor, what can we do, gentlemen, with the good doctor's exhibits?

MR. COHEN: I have a photostatic copy, if your Honor please. If the doctor would just compare it to make absolutely certain, and if it's agreeable to everybody, we can substitute it. It's a certified copy from the City.

THE WITNESS: The only reason is I don't want to lose the original, God forbid you should need it.

MR. COHEN: I should say I have certain underlinings and markings on my exhibit which I would agree are not part of the exhibit.

MR. LORY: I would prefer a clean copy.

THE COURT: Can you leave the original with Mr. Cohen and he will photocopy it and send it back?

THE WITNESS: Yes.

(Witness excused.)

THE COURT: Mr. Cohen, I will consign these into your careful hands.

MR. COHEN: Thank you, your Honor. Actually, we don't need all of these pages.

Doctor, we have only marked the autopsy

1 Gpa 210

2 report which is two pages, and the report from the  
3 hospital. I can give you these other two sheets back,  
4 if nobody has any objection.

5 If your Honor please, I now propose to read  
6 a short section from the deposition given by  
7 Mrs. Iannuzzi, but before I do so, because I think it  
8 may elicit objections, may we approach your Honor at the  
9 side bar?

10 THE COURT: Sure.

11 (At the side bar.)

12 THE COURT: Mr. Lory, Mr. Cohen tells me he  
13 is almost through. Do you have any rebuttal testimony  
14 that you have to offer?

15 MR. LORY: You have to rule on that situation  
16 and I have to call the gentleman --

17 MR. COHEN: You don't have to call him, I will  
18 stipulate to authenticity.

19 I propose to read from Mrs. Iannuzzi's  
20 deposition starting at page 16, line 19 through to page 19,  
21 line 12.

22 MR. LORY: I will object to that most strongly  
23 because it's strictly hearsay in its boldest and blackest  
24 form.

25 THE COURT: Why is that admissible?

1 Gpa 211  
2 MR. COHEN: These are admissions against  
3 interest and they are statements made by counsel which  
4 are binding upon plaintiff.

5 MR. LORY: What statements made by counsel?

6 THE COURT: What does the lawyer have to say?  
7 Is that the gentleman that was sitting out here all along?

8 MR. COHEN: No, that was Mr. Gritz.

9 THE COURT: That was Mr. Gritz sitting there?

10 MR. COHEN: No. That was Mr. McCarren who  
11 was sitting here. He was with New Jersey Export Marine.  
12 But what she was testifying to here was information she  
13 got from her own attorney, Mr. Gritz, and I think what  
14 he told her about his knowledge of how this accident  
15 happened and her testifying to it here, I think it's an  
16 admission against their interests and, therefore, useable.  
17 Certainly this jury has a right to hear what these people  
18 knew and claimed back then before Mr. Lory comes in and  
19 talks to them in his opening and now in his summation about  
20 an alleged slug of air in the winch.

21 THE COURT: That latter statement commends  
22 itself to be more than the former. Let me ask you this.  
23 How much more are you going to read?

24 MR. COHEN: That's all. That's my case.

25 THE COURT: I am going to recess overnight

1 Gpa 212

2 and you can read it in tomorrow morning if I consider  
3 it admissible.

4 Mr. Lory, do you want to tell me what it is  
5 that you want to put into evidence? Do you have the  
6 document that you want to put into evidence?

7 MR. LORY: I don't want to put a document in,  
8 your Honor.

9 THE COURT: I thought you did.

10 MR. LORY: The statement is written on a  
11 document. I am concerned with the contents which states  
12 Mr. Coppola stated etc., etc., etc. as to what transpired  
13 at the time of the accident; that ITO adopted this and  
14 forwarded this information on to the Department of Labor;  
15 that this was their version as to how the accident  
16 happened and it's part of the business record.

17 THE COURT: Would you furnish me with that?  
18 Could you give me the section of the U.S. Code that  
19 you say excludes it?

20 MR. COHEN: I gave it to your clerk. I will  
21 give it to you again.

22 THE COURT: No. If he has it that's all I  
23 need.

24 Why don't you give me that document.

25 MR. KAUF: If your Honor please, may we give

Gpa 213

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you the original of that transcript?

MR. COHEN: Mine is marked up with what I want to read.

THE COURT: No, I would just as soon keep this. Then we are through for the day.

MR. LORY: May we take a moment more?

MR. COHEN: Why can't we recess the jury and show the Judge the statement or record you are talking about.

THE COURT: Will you be prepared to sum up at 10:00 in the morning?

MR. COHEN: Absolutely.

(In open court.)

THE COURT: Ladies and gentlemen, we are virtually concluded with the taking of proof. Because of the relative lateness of the hour I am not going to ask counsel to address you at this time in summation, but I will commence the summations at 10:00 in the morning. So tomorrow will be a day of considering the legal arguments that counsel will proffer to you and receiving my charge on the law as appropriate and conducting your deliberations as appropriate in accordance with the law and the evidence as you determine it.

Now, we are, therefore, in recess as far as

1 Gpa 214

2 you are concerned until 10:00 in the morning. Again,  
3 do not speak with anyone about this case. Continue to  
4 keep an open mind because you have not yet gone to the  
5 jury room to begin discussion amongst yourselves as to  
6 what the facts are as you shall find them. Good night  
7 and we will see you in the morning.

8 (Jury not present.)

9 THE COURT: May the record show I have been  
10 furnished with a carbon copy of the employer's first  
11 report of accident.

12 Mr. Lory, this is what Mr. Coppola said,  
13 that which is described in box 25?

14 MR. LORY: Yes.

15 (Pause.)

16 THE COURT: Mr. Lory states to me that it's  
17 paragraph 25 of this exhibit which will be marked  
18 Plaintiff's Exhibit 19 for identification.

19 (Plaintiff's Exhibit 19 marked for  
20 identification.)

21 MR. LORY: With respect to that paragraph,  
22 your Honor, the statute itself does make mention of how  
23 it can be used, but I call the attention of the Court  
24 that as far as ITO, this is a self-serving declaration.  
25 As far as the privilege that is set forth in the statute

Gpa 215

1  
2 that is not being evidence of the facts contained there,  
3 this is subject matter for the plaintiff to waive  
4 because as to him it's not self-serving. This is something  
5 that is offered by his employer in the regular course  
6 of business, performing its duties with respect to the  
7 obligations of the law and, if anything, this would be  
8 an admission against interest as far as the employer is  
9 concerned.

10 MR. COHEN: This statute that prohibits the  
11 use of this, because it's not evidence of any sort is  
12 for the benefit of the employer, who is compelled in  
13 order to make compensation payment, to immediately  
14 get a report to the deputy commissioner.

15 THE COURT: And therefore not be stuck with  
16 the report he makes in the regal sense.

17 MR. COHEN: Right, and if he delays he is  
18 saddled with a penalty and in many instances this is  
19 hearsay. In any event, your Honor, I submit this  
20 would be nothing more, at best, than a prior consistent  
21 statement of Mr. Coppola's which if Mr. Lory had in his  
22 file he couldn't use.

23 THE COURT: I am inclined to rule against  
24 you, Mr. Lory, but I will think about it overnight  
25 with the statute.

Gpa 216

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2 MR. LORY: Also before we conclude, if it's  
3 as Mr. Cohen sets forth subject to amendment, the fact  
4 that they have not filed an amendment to that particular  
5 paragraph is also of great importance to the facts in  
6 this particular case.

7 MR. COHEN: That has no probative value to  
8 the issues in this case at all.

9 MR. LORY: IT does insofar as you have  
10 altered your particular position with respect to the  
11 matter of the happening of the accident.

12 MR. COHEN: My position has never been  
13 altered. If you want to start this I will put you on the  
14 stand and prove through you that I sent you a letter  
15 by certified mail several years ago telling you you are  
16 suing the wrong party and that the carpenters were the  
17 party involved.

18 MR. LORY: What has that got to do with  
19 anything?

20 MR. COHEN: It shows my position has never  
21 changed. I put you on notice just so you wouldn't be  
22 able to take this dear little tact at this point in  
23 time.

24 MR. LORY: Mr. Cohen, the item speaks for  
25 International Terminal Operating Company, not Joseph R. Cohen

Gpa 217

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1  
2 MR. COHEN: I put you on notice that you are  
3 suing the wrong people, you should be suing the  
4 carpenters. I put you on notice by certified mail years  
5 ago. I spoke to you several times on the telephone.  
6 I implored you to --

7 MR. LORY: Then why didn't you counter-claim  
8 against them?

9 MR. COHEN: I don't counter-claim against  
10 anybody.

11 MR. LORY: You do against everybody else.

12 THE COURT: I will rule on Exhibit 19  
13 overnight. I take it that the defendants at this point  
14 renew the motions made at the close of the plaintiffs  
15 case and move for a directed verdict in each of their  
16 respective favors on the entire record?

17 MR. COHEN: Except I think the motions ought  
18 to be amplified on the basis of Mr. Andre's confession  
19 as to how this accident happened.

20 MR. LORY: I am going to object to the use  
21 of the word, "confession." We are not dealing with a  
22 criminal matter.

23 THE COURT: Mr. Lory, he is urging law to me  
24 and I understand the nature of the word.

25 MR. COHEN: I would think that any verdict

Gpa 218

that comes in in favor of this plaintiff against this defendant would be contrary to the weight of the evidence and would have to be set aside. Under those circumstances I submit your Honor should dismiss this case. I am asking your Honor to bear in mind not only Mr. Andre's confessions or admissions, if Mr. Lory will, but also the unbiased, undisputed testimony of the medical examiner of the State of New York who has -- putting all his testimony together, has indicated that the injuries he found could have been caused either by a falling piece of lumber or could have been caused by Mr. Iannuzzi falling into the hatch and landing squarely on his head.

However, if the latter had happened and was caused by Mr. Iannuzzi having been hit by this moving vehicle, as Mr. Lory has been contending, the medical examiner said he would expect to find marks of the vehicle about the neck, shoulders, back, where it was that he was struck and he found no such marks. "It would seem to me that excludes that possibility, leaving you only with the other, which ties in completely with Mr. Andre's confession, and as I see it, your Honor, I submit that this case should not go to the jury.

THE COURT: I continue to be troubled with

1  
2 this case, as I have been all along, in that it seems  
3 to me between Mr. Coppola and the plaintiff's expert  
4 who made a statement that the winch had air in it, in his  
5 opinion, requires me to submit this to the jury on the  
6 theory of unseaworthiness.

7 Now, I reserve decision on both of those.  
8 I reserve decision on negligence, on the theory that I  
9 am not quite sure as to whether the notice provision --  
10 notice requirement is being satisfied.

11 MR. COHEN: I also had a motion to strike  
12 that part of Mr. Ferenczy's testimony on the basis that  
13 he gave that testimony assuming facts not in the record.

14 MR. LORY: He gave testimony predicated upon  
15 facts as set forth in the plans and instructions given  
16 to him and upon the hypothetical questions that were  
17 put to him.

18 MR. KAIN: May I join in that portion of  
19 Mr. Cohen's, your Honor? I also have some motions I  
20 wish to make, but it's my recollection that Mr. Ferenczy,  
21 as Mr. Cohen states, also assumed on the basis of his  
22 own testimony certain reflex times, and Mr. Coppola's,  
23 for that matter, any individual's ability to react to  
24 putting this winch into the neutral position, things of  
25 that sort, and I submit there is no basis, and Mr. Cohen

1 Gpa 220

2 has pointed it out, in the record, to show any expertise  
3 on the part of Mr. Ferenczy as to the reaction time of  
4 anybody, let alone Mr. Coppola, the specific winchman in  
5 this case.

6 MR. LORY: If your Honor please, there was  
7 no breakdown as to time. The witness was merely expressing  
8 an opinion based upon the fact that in order to move the  
9 cargo on the basis, or as was described, to take a  
10 strain on the up and down and slack off on the burton,  
11 that these movements were necessary and he was trying to  
12 describe to this jury exactly what would happen as the  
13 levers moved in each direction.

14 Counsel leap upon this with respect to  
15 a segmented version of what happened, which stops  
16 here and stops there and signposts there. There is nothing  
17 in the record, and it was not intended in that particular  
18 fashion. The witness was merely describing what would  
19 happen as the handle progressed from one side to the  
20 other, from the hoist position to the lowering position.

21 MR. COHEN: No. Mr. Coppola testified that  
22 as he started to slacken off with the burton it ran away  
23 from him and he immediately put the handle back into  
24 the neutral position while manipulating the up and down.  
25 Mr. Ferenczy quite clearly said several times during the

1 Gpa 221

2 course of his testimony that he was assuming that  
3 Mr. Coppola did not do that; that he assumed that  
4 Mr. Coppola when he first put the handle of the burton  
5 ahead slowly in slack and got a sluggish response,  
6 according to Mr. Ferenczy, he then put it further ahead.

7 Now, none of that is what Mr. Coppola  
8 testified to. He didn't say he got a sluggish response.  
9 He said the winch ran away from him and he brought the  
10 handle back to neutral. Mr. Ferenczy said that doesn't  
11 tie in with his theory because with his theory the  
12 air makes the response sluggish, so he said Mr. Coppola  
13 put it ahead, got a sluggish response and then put it  
14 further ahead.

15 Now, Mr. Coppola said nothing like that at  
16 all, your Honor, and that's why Mr. Ferenczy's testimony  
17 should be stricken. Nothing could be clearer than the  
18 fact that Mr. Ferenczy was fighting with the factual  
19 testimony given by Mr. Coppola. He couldn't accept himself.  
20 In fact he said in his own language, "I can't --"

21 THE COURT: The problem is without having the  
22 transcript I really cannot rule on the position you are  
23 taking because I cannot examine each and every answer to  
24 determine whether or not fairly within some  
25 answer is not sufficient to require this to go to the jury.

1 My personal notes show, "His opinion was that the system  
2 contained air."  
3

4 MR. COHEN: Right.

5 MR. KAIN: There is no question about that,  
6 your Honor. That's my recollection also.

7 THE COURT: He attributes this accident to  
8 the system containing air. Now, if you get down into  
9 niceties of what he did with the handle, maybe there is  
10 a basis for striking it, but I couldn't rule on that  
11 without looking at each question and answer all the way  
12 through and giving Mr. Lory a chance to argue to me that  
13 from a certain answer the jury could conclude properly  
14 that the vessel was unseaworthy.

15 MR. COHEN: I understand what you are saying,  
16 but all I am trying to point out is he wasn't an  
17 eyewitness and didn't inspect this winch and his conclusion  
18 that it contained air comes about from his statement  
19 that air would make the response sluggish. There is no  
20 doubt with his saying that, and then he said that the  
21 winch operator receiving a sluggish response would  
22 push the handle ahead. Mr. Coppola said just the  
23 opposite would happen. That is why Mr. Ferenczy's  
24 answers are just sheer speculation. Mr. Coppola said  
25 it ran away as soon as he put the handle ahead.

1 Gpa 223

2 Mr. Ferenczy said it would make it a sluggish response.  
3 Obviously he is not describing the situation Mr. Coppola,  
4 who was present, was describing. That's why it was  
5 stricken. It wasn't described upon any testimony in  
6 this record.

7 THE COURT: That's why, as I recall, when you  
8 raised that objection, and properly so, he continued to  
9 give testimony on direct examination with that factor out  
10 of it.

11 MR. COHEN: No, he said he couldn't in his  
12 words qualify Mr. Coppola's testimony. It was a strange  
13 use of the word, "qualify," but I asked him bluntly  
14 whether he could believe it and he said he couldn't  
15 qualify it.

16 THE COURT: I would say if I had Mr. Ferenczy's  
17 direct examination before me, the questions and answers,  
18 I would be prepared to give that.

19 MR. KAIN: His direct examination, sir, I  
20 believe we have it. We ordered a copy of that and I  
21 believe we now have it.

22 THE COURT: I might be able to see whether  
23 or not there was any basis for this motion to strike, but  
24 without that, no.

25 MR. KAIN: Is it appropriate for me at this time,

1 Gpa 224

2 your Honor, to make my motions at the end?

3 THE COURT: Sure.

4 MR. COHEN: Before you do that, do you have  
5 Mr. Ferenczy's testimony?

6 MR. KAIN: I have his direct testimony.  
7 That's all I ordered, his direct testimony.

8 THE COURT: I will give consideration to the  
9 motion.

10 In other words, your position, Mr. Cohen,  
11 is that his conclusion has as a necessary ingredient the  
12 fact that Coppola kept pushing the handle forward when  
13 he didn't get the response that he wanted and that  
14 Coppola's testimony was that when the thing started to  
15 run away he put it in neutral as I recall.

16 MR. COHEN: Yes.

17 THE COURT: I understand your position.

18 MR. LORY: You cannot, based upon what your  
19 Honor has just related, form any conclusion without  
20 also the testimony of Mr. Coppola, because I contest  
21 Mr. Cohen's version of this. As I recall Mr. Coppola's  
22 testimony he raised the vehicle with respect to the burton;  
23 then he proceeded to take up slack, or to take a strain  
24 on the up and down, at which time he now proceeded to  
25 slack off. As he proceeded to slack off, which indicates

1 Gpa 225

2 to me a movement of the burton handle from the hoist  
3 position through the neutral position into the lowering  
4 position, because it's the only way you can start to  
5 slack off.

6 THE COURT: Let me read this through and see  
7 whether you are right.

8 Go ahead, Mr. Kain.

9 MR. KAIN: At this time, your Honor, the  
10 defendant renews the motions made at the end of the  
11 plaintiff's case to dismiss the negligence count  
12 in the complaint on the ground that there has been no  
13 proof of notice to the shipowner of any sort and that  
14 necessarily the claim for negligence must fail on the  
15 grounds that there has been no showing of either actual  
16 or constructive notice to this shipowner.

17 I submit to your Honor that the only claim  
18 of notice was a claim that at 11:30 in the morning  
19 difficulty was experienced with the handles, aside from  
20 the fact that there has been no causal connection  
21 established between the possibility of air in this  
22 winch that would cause a stiffness or a hardworkingness  
23 of that handle. As a matter of fact, the testimony is  
24 just to the contrary. It's also defendant's contention  
25 that it's too remote in time to constitute notice, since

1           Gpa 226  
2           on the basis of Mr. Coppola's testimony the winch  
3           operated with no difficulty up to the very time of the  
4           accident.

5                       Secondly, the defendant moves to dismiss  
6           the unseaworthiness complaint on the grounds previously  
7           stated to your Honor that there is no credible evidence  
8           of any air in this system. The only competent evidence  
9           is that the erratic motion described by Mr. Coppola  
10          in his testimony could be accounted for by Mr. Coppola's  
11          own actions in the manner in which he operated the  
12          handles of the remote system in operating these winches.

13                      The defendant and third-party plaintiff  
14          also moves for a directed verdict against the plaintiff  
15          on the same basis; that there is no evidence of either  
16          actual or constructive notice on the negligence count  
17          and on the basis just stated of the unseaworthiness  
18          count, and further that the plaintiff's contentions are  
19          against the weight of the credible evidence in this case  
20          adduced from the various witnesses who have testified.

21                      The defendant further moves for a  
22          directed verdict against ITO on the grounds that the  
23          uncontroverted testimony in this case is that the  
24          decedent, Mr. Iannuzzi, was standing in the plane of the  
25          falls; that he necessarily had to be standing in the

Gpa 227

1 plane of the falls for this accident in the manner  
2 contended by plaintiff to have happened and that the  
3 uncontroverted testimony in this case, should the jury  
4 accept plaintiff's contention as to the manner in which  
5 this accident happened is that Mr. Iannuzzi was stationed  
6 where he should not have been and was negligent by  
7 stationing himself in this position and defendant and  
8 third-party plaintiff contend that on the basis of the  
9 decisions of the Court of Appeals in this circuit in  
10 Mortonson-McLoughlin and I believe the last one was  
11 Hartnett against Reis, should the jury so determine  
12 that plaintiff is entitled to recover on the theory  
13 espoused by plaintiff, then defendant and third-party  
14 plaintiff submits that in this eventuality the defendant  
15 and third-party plaintiff is entitled to a directed  
16 verdict against the third party defendant ITO.  
17

18 THE COURT: Are those in the request to  
19 charge. those citation?

20 MR. KAIN: I believe they are all in my  
21 requests to charge, yes, sir, or they may be in my  
22 trial brief, but they are certainly in.

23 THE COURT: What is this, Mortonson?

24 MR. KAIN: Mortonson is one of them, if your  
25 Honor please. McLoughlin is a subsequent case. The

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Gpa 229

1                   The Supreme Court, in the case of  
2  
3       Weyerhouser against Nassarema Operating Company,  
4       355 U.S. 563, has held that the issues involved in a  
5       maritime claim for indemnity are for jury determination.  
6       They similarly held that in the case of ITO against N.V.  
7       Nederl 393 U.S. 74. I recently tried a case in the  
8       State Court, which of course utilized the maritime law,  
9       and again there was a finding of contributory negligence  
10      on the part of the plaintiff. Once again the Judge  
11      did not grant indemnity as a matter of law and the jury  
12      gave a verdict against the shipowner on the indemnity  
13      claim. It was appealed to the first department and it  
14      was sustained notwithstanding the identical argument  
15      made there as Mr. Kain makes here that he is automatically  
16      entitled to indemnity. I have a printed brief on that.

17                   Could I give a copy of that to your Honor?

18                   THE COURT: Surely.

19                   MR. COHEN: You have in my request to charge  
20      the Lanzetti decision, which is a fairly recent decision  
21      from the District Court in New Jersey, the Third Circuit,  
22      also dealing with contributory negligence and Mr. Kain's  
23      contention, which they don't follow.

24                   THE COURT: Off the record.

25                   (Discussion off the record.)

1  
2 MR. KAIN: If I may, your Honor, continue with  
3 a further ground, that the defendant and third-party  
4 plaintiff also moves for a directed verdict against  
5 the third party defendant, ITO, assuming again that the  
6 jury returns a verdict in plaintiff's favor on the basis  
7 of plaintiff's claim on the grounds that the air slug  
8 testified to by plaintiff's expert witness is, by the  
9 consensus of testimony of all experts who have testified  
10 in this case, and also -- I am sorry, all experts who  
11 have testified in this case a gradual process  
12 and the uncontroverted testimony is that a winch  
13 operator should recognize these symptoms. I submit  
14 to your Honor that there is no contrary evidence in  
15 this case and I submit to your Honor that if this  
16 be so, it's a gradual process which continues over  
17 a period of time in building up this air slug and that  
18 it necessarily is negligence on the part of the winch  
19 operator to pick it up based on his testimony that he was  
20 a winch operator, with I think he said seven to twelve  
21 years.

22 MR. COHEN: It seems to me based on that  
23 position Mr. Lory is entitled to judgment against  
24 you. I didn't understand that you were conceding that  
25 there was an air slug in this winch.

1 Gpa 231

2 MR. KAIN: I said assuming the jury should  
3 determine in plaintiff's favor on that basis.

4 THE COURT: Let's be sure I have the  
5 motions. I want to set about getting the charge up  
6 and I'm sure you gentlemen want to set about getting  
7 your summations.

8 MR. KAIN: That concludes my motions at  
9 this time.

10 MR. COHEN: Could I make a motion vis-a-vis  
11 the third-party complaint?

12 THE COURT: Yes, you may.

13 MR. COHEN: At this time, your Honor,  
14 I move for dismissal of the third-party complaint or  
15 direction of a verdict in favor of the stevedore, ITO,  
16 against the shipowner upon the grounds that the  
17 shipowner has failed to make out any prima facie  
18 case to go to this jury that would warrant its  
19 recovering indemnity from ITO. that the shipowners  
20 own proof establishes that there was no defect in its  
21 winch upon which ITO worked and that the credible  
22 evidence here establishes that Mr. Iannuzzi was not on  
23 the main deck, but was on the upper 'tween deck, and that  
24 a carpenter unrelated to my client dropped some lumber  
25 upon his head from the upper 'tween deck for which fact

1 Gpa 232

2 situation my client could no ways be responsible.

3 Mr. Kain's own expert witness, Captain Wheeler,

4 testified that it's good and proper stevedoring practice

5 and winchmanship for the winchman to bring in a draft

6 a height of two feet over the coaming which would in this

7 case make it approximately six feet off the deck, and

8 there is no proof at all in this case that

9 Mr. Coppola did anything but bring it in at that height,

10 or indeed possibly slightly higher.

11 So there is no proof that Mr. Coppola

12 was at fault in operating the winch. There is no

13 credible evidence of any fault on the part of ITO,

14 and I ask that the third-party action be dismissed,

15 and in addition I ask that in view of the fact that this

16 shipowner was aware from the very beginning through the

17 reports made to it, to its own boatswain that the

18 accident was to have been caused -- was claimed to have

19 been caused by a carpenter who dropped pieces of lumber

20 on Mr. Iannuzzi, but this shipowner has not acted in "

21 good faith in impleading my client alone in this action;

22 has failed to pursue the tort-feasor that it

23 knew at the very outset was involved in this case, and

24 I submit that not only should their action be dismissed,

25 but that I should granted counsel fees for the expenses

1 necessarily incurred by my client in defending against  
2 this claim which I submit was brought in bad faith.  
3

4 MR. KAIN: May I just state two things for  
5 the record, if your Honor please?

6 THE COURT: Yes.

7 MR. KAIN: Mr. Cohen has raised this question  
8 of notice to the shipowner of the possibility that some  
9 other method occurred in this accident, and also  
10 notice to plaintiff's counsel. As Mr. Cohen points out,  
11 Mr. Cohen also had notice of this, since he went  
12 on record and wrote on the basis of his own  
13 statement to Mr. Lory, and I submit to your Honor that  
14 if Mr. Cohen had any doubts as to the advisability of  
15 bringing in the carpenter, he certainly was as free  
16 to bring in the carpenter as a defendant or third-party  
17 defendant or second third-party defendant as was the  
18 shipowner.

19 MR. COHEN: I don't know what duty the  
20 carpenter would have owed to my client.

21 MR. KAIN: I submit to your Honor further  
22 on the record that in my opinion, and I have handled  
23 this case from the beginning, it's not my burden to  
24 establish how a decedent's accident may have occurred.  
25 It's my burden, and I deemed it advisable to do, to in

1 effect seek to controvert the plaintiff's contentions  
2 as to how the accident occurred. May I also say to  
3 your Honor, lest I be accused of surprise tomorrow  
4 morning, that at that time it's my intention to ask  
5 your Honor, in submitting questions to the jury, that  
6 even if they should return a verdict in the defendant's  
7 favor, I would ask your Honor to direct the jury to  
8 nevertheless answer any question as to was the decedent  
9 negligent, contributorily negligent, and on the  
10 basis of that answer, assuming it's answered in the  
11 affirmative, it's my intention to move before your  
12 Honor for that pro rata share of legal fees and  
13 disbursements incurred in the defense against  
14 plaintiff's counsel.

16 THE COURT: That brings me to a question  
17 that I wanted to ask all of you gentlemen, since you  
18 are extremely familiar with this particular area of  
19 trial work. I am going to work up charges that will  
20 take each segment of this in a separate bite.

21 Now, I understand from some research that  
22 we did sometime ago that following the  
23 jury's verdict on the third party claim, it's appropriate  
24 for you to submit further proof to this jury as to  
25 counsel fees.

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MR. COHEN: Yes, sir.

THE COURT: And the question of who was liable for them.

MR. COHEN: Yes.

THE COURT: That brings us into the problem of time. Are you prepared to do it and how long is it going to take and what jury and all sorts of things like that.

MR. KAIN: I would submit to your Honor that I know of no basis, at least as of now, no theory under which the third-party defendant stevedore is entitled to move against this shipowner for either a pro rata share of legal fees or disbursements or --

MR. COHEN: Aren't you familiar with Judge Murphy's decision in the Messina case? I have already recovered counsel fees in an analogous situation.

MR. KAIN: I know of no appropriate case that gives him such a right, but I also believe, your Honor, that it's inappropriate at this time, and I think it's impossible for us to adequately comply with the proof, which is one of the reasons I moved for a severance, to present to this jury, even assuming that they should return their verdict and dispose of

Gpa 236

1 this case otherwise tomorrow before the day is out, I  
2 don't believe it's appropriate at that time, and I  
3 submit insofar as the defendant shipowner is  
4 concerned, I believe it's an impossibility of ours to  
5 assemble the necessary information to produce it. I  
6 further submit to your Honor that I have, I think,  
7 now three cases currently pending in the Court of  
8 Appeals where counsel, including in some instances  
9 Mr. Cohen's office, I believe, where this has been in  
10 effect left to abide; in other words, it was not  
11 tried out because of the appeal and I would anticipate  
12 there is at least a possibility of it here. It  
13 would seem to me more economical of the Court's time  
14 if the motion which I made to sever should be granted,  
15 and if at an appropriate time at the conclusion  
16 when it's possible to do so, assuming here again if  
17 the case is going to be appealed, it seems to me more  
18 practical -- at least this has been the course  
19 followed in the cases, as I say, that I now have,  
20 where counsel have agreed that depending upon this  
21 position made in the Court of Appeals, that we will  
22 thereafter tryout the issue should it be necessary.

23  
24 In other words, if counsel can't agree,  
25 it would be tried out before a Judge and jury, and I

1 Gpa 237

2 know this has been done on several occasions, depending  
3 upon the particular Judge's wishes.

4 THE COURT: That is my inclination, too.

5 MR. COHEN: We discussed this very  
6 problem at the outset of this case about three weeks  
7 ago and Mr. Kain knew then and I advised your Honor  
8 then and I submitted a brief to your Honor that it  
9 was my position that Mr. Kain had to establish his claim  
10 for counsel fees if he should be found entitled to them  
11 before this jury.

12 I had no objection to his doing that after  
13 a verdict was received on the main case so that  
14 that issue would not affect the jury's consideration of  
15 the main case, but I do submit, and I have given a brief  
16 to your Honor, that he can't cull out one damage  
17 item out of his claim and say that should be reserved  
18 for some later jury at some later date. We are now before  
19 the best jury in the world to evaluate how much Mr. Kain's  
20 services in defense of this case were. It's this jury  
21 that will readily see that Mr. Kain completely failed  
22 in defense of the action against his client. He  
23 completely failed to put in the proof that he knew  
24 existed to show that this accident happened because a  
25 carpenter dropped lumber on Mr. Iannuzzi's head and this

1 jury has a right to consider how much the services of  
2 a lawyer handling the defense of a client in that  
3 fashion, and in other respects, are worth.  
4

5 I just don't believe that there is any  
6 law that permits him to cull a solitary damage  
7 item out of his entire claim and say, "I want a different  
8 jury trial at a later date on that one issue."

9 MR. KAIN: May I just content myself by  
10 pointing out to your Honor that the two cases cited by  
11 Mr. Cohen I believe in his brief do not involve situations  
12 where a motion was made to sever by one of the parties.

13 MR. COHEN: He can't submit a cause of action  
14 in the fashion that he wants to do by culling out one  
15 single item of the damage claim, and there is no  
16 reason why he couldn't be prepared because he knew I'd  
17 say three weeks ago. Before we began this trial we  
18 had this discussion, if your Honor will recall. He  
19 knew then that I was insisting that that part of his  
20 claim be tried before this jury.

21 MR. KAIN: I don't think I am necessarily  
22 required to assume the success of Mr. Cohen's every  
23 application, if your Honor please.

24 THE COURT: Let me think about that  
25 overnight. The practical problem is how long is it going

1 Gpa 239

2 to take. This jury is sitting in the third week here.

3 MR. COHEN: Right. We have two alternates.  
4 I don't know that it poses any real problem.

5 THE COURT: I know, but I have to discharge  
6 those two alternates tomorrow before they begin considering  
7 the issue number one.

8 MR. COHEN: Could you discharge them, but  
9 hold them?

10 MR. LORY: That's like can we amputate but  
11 hold onto the residue.

12 MR. COHEN: No, you are discharging them from  
13 deliberation, but you are holding them for possible use  
14 on a different aspect of the case.

15 THE COURT: Let me think about it. The  
16 problem is even assuming Mr. Kain were prepared to go  
17 forward and you were prepared to cross examine, we have  
18 another day's testimony, another summation, another  
19 charge --

20 MR. COHEN: And you would have my proof on  
21 that, too.

22 THE COURT: And that's two days worth of  
23 stuff.

24 MR. COHEN: It has to be done at some  
25 time, your Honor, if he wants to persist in this claim.

Gpa 240

THE COURT: I know that is so. The practicalities of the situation are that you wipe out an entire day of my time with 12 pre-trials and four motions on Friday and going to Washington for a conference next week all week, so that is a factor that I have to bear in it. Let me think about this overnight.

Now, Mr. Lory, if you will just for two seconds please address yourself to what you contend constitutes the notice of negligence to the vessel.

MR. LORY: The fact that the system, as described -- I don't recall, but by either Mr. Pitt or Mr. Gous -- required the addition of fluid. They knew about this. The fact that the system required the addition of fluid bespeaks the fact that the system leaks, because otherwise the fluid would remain within the system. Once you have the --

THE COURT: Let me stop you a minute. If you are saying that it's their regular maintenance on the northbound voyage --

MR. LORY: I am saying it's the maintenance throughout. They only maintained them on the northbound voyage --

THE COURT: Yes, and there is no proof that anybody was aware of leakage at any other time.

1  
2 MR. LORY: If your Honor please, they  
3 mentioned in their transcript and in their testimony  
4 which is in this record that they did have prior  
5 experience with respect to the leakage. They  
6 conceded also that all these systems are subject to  
7 leakage --

8 THE COURT: But if you are going to charge  
9 somebody with negligence, there has got to be some  
10 notice to the negligent party of the situation and a  
11 failure to respond --

12 MR. LORY: That is just my point. They had  
13 notice of the situation and the mere fact that they keep  
14 adding fluid is not sufficient to cure it because it keeps  
15 on occurring.

16 THE COURT: I know, but we had no proof that  
17 this situation ever existed before. Have we ever had any  
18 slippage of these winches?

19 MR. COHEN: What he is saying is because they  
20 have a maintenance practice, that proves they are  
21 on notice.

22 THE COURT: That is what I am getting at.  
23 I don't see that.

24 MR. LORY: Let me explain it in this particular  
25 fashion. The system we know, if it's completely filled

1 Goa 242

2 and is free of leaks will not require the addition of  
3 further fluid. Here they tell us that they do have a  
4 history and experience of having to add fluid periodically.  
5 We do have it on this occasion at 11:00 on the day of this  
6 accident. They speak of having to do it even on the  
7 southbound voyage and they also concede the fact, Mr. Pitt  
8 or Mr. Gous, I don't recall which --

9 THE COURT: On the southbound voyage?

10 MR. LORY: Yes. I think Mr. Kain --

11 MR. KAIN: I have no recollection of anything  
12 on the southbound voyage.

13 MR. LORY: He said on occasion he had to  
14 add fluid.

15 THE COURT: You can't go back weeks before  
16 and say that something that happened weeks before  
17 constitutes notice of a condition where these fellows  
18 were running these winches just as hard as hell for two  
19 days.

20 MR. LORY: All I am saying, your Honor, is  
21 the fact that they are aware and follow a practice  
22 of adding fluid in these winches, the absence of  
23 which would permit the entrance or the presence of air  
24 within the system puts them on notice. These winches are  
25 forever in their control and in their possession.

1 THE COURT: You are making them insurers.

2 MR. KAIN: He is also, if I may submit to  
3 your Honor, contending, if I understand him, that these  
4 winches are improperly designed and the system is  
5 improperly designed because they are on notice of  
6 improper design.  
7

8 THE COURT: It seems to me my memory of  
9 Mr. Ferenczy was that he testified that the 11:30 in the  
10 morning incident had no connection whatsoever with the  
11 7:30 in the afternoon incident.

12 MR. KAIN: That's correct, sir.

13 THE COURT: That knocks out this  
14 alleged stiff handle business that we had some  
15 testimony about with Coppola, so then you have got to  
16 look somewhere else for notice, and if it's to go  
17 back to a maintenance check on the voyage up--

18 MR. LORY: It doesn't knock it out in  
19 this respect, your Honor: Mr. Napolitano told us in  
20 comparison one may appear soft or the other may not  
21 appear so soft or stiffer and I used the word stiffer.

22 THE COURT: And he corrected it. I  
23 specifically asked him about it. I was troubled to the  
24 extent that I wasn't sure that his answer was an inadvertent  
25 response to the form of your question and he said that

1 he hadn't meant stiff, he had meant that one would  
2 be harder than the other; that the response on the  
3 filled side would be normal and the response on  
4 the air side would be softer and that's what he meant by it.

5 MR. LORY: It's plaintiff's contention that  
6 the use of the word stiff merely denotes this.

7 THE COURT: I don't accept that. I  
8 didn't accept it when you put the question because  
9 I felt the witness had answered a question that he  
10 really hadn't understood and he confirmed that when I  
11 asked him about it.

12 In any event, your position is that it's  
13 the maintenance on the trip up?

14 MR. LORY: The maintenance throughout; the  
15 fact that they had knowledge of the fact that these winches  
16 and this remote system required attention, required the  
17 addition of fluid. This fluid is not consumed. It  
18 leaks out of the system and this permits the entrance of  
19 air.

20 THE COURT: It's your position, then, that  
21 a filling with oil on a maintenance task some days  
22 before is notice to them of the danger of this system on  
23 the 24th?

24 MR. LORY: Not quite, your Honor. The filling is  
25

1 notice to them that the system leaks and the mere  
2 filling is not sufficient to correct a defect of the  
3 leaking. But for the fact that the system leaks you  
4 would not have the reduction of fluid or the onset and  
5 introduction of air. This is a repeating pattern.  
6 It's not only isolated to the one occasion on the  
7 northbound voyage. They admit a history of having to add  
8 fluid, and I submit to your Honor the fact that they  
9 must --  
10

11 THE COURT: Is it a history or is that the  
12 way the systems are made? Everybody says these systems  
13 automatically leak and they are automatically maintained.  
14 So the maintenance is not -- I would assume that  
15 every hydrolic winch in the world is maintained on this  
16 basis.

17 MR. KAIN: That is the testimony, actually,  
18 by Mr. Napolitano and I believe by Mr. Ferenczy, but  
19 I submit further to your Honor that there is no  
20 testimony produced here by Mr. Lory as to any defect in  
21 the maintenance -- that the maintenance as described  
22 by Mr. Pitt was defective or improper. There is  
23 testimony here that these -- of the necessity of  
24 occasionally bleeding through to remove air is an improper  
25 procedure or a sign of a defect in the system.

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These are all conclusions drawn by Mr. Lory purely gratuitous without the basis of any expert testimony.

THE COURT: I think I understand.

All right, I will reserve decision on all the motions.

MR. LORY: I think you have one thing left with respect to my proffer, and that would be as to the offer of earnings on the hourly rate which still remains open.

MR. COHEN: You were going to call New York Shipping and tell us.

MR. LORY: No, I wasn't. I think somebody was going to do that, because I got it from New York Shipping.

MR. COHEN: You got the hatch boss' rate from New York Shipping and you had agreed to call to get the rate for the ordinary longshoremen.

MR. LORY: Mr. Cohen, please don't tell me what I agreed to. I submitted the hatch boss' earnings. You contested it and said as of 1972 it should be a regular longshoreman.

MR. KAIN: In the interest of less heat and smoke, if it's agreeable to the defendant, your Honor,

Gna 247

1 that if Mr. Lory re-represents to us that he has  
2 ascertained from the New York Shipping Association that  
3 the hourly rate for a longshoreman and hatch boss is  
4 the same, we will agree to it. If he represents there  
5 is a difference, I submit to your Honor we can then argue  
6 whether he is entitled to go to this jury on the  
7 question of a hatch boss' hourly rates and if not, should  
8 he go on a --  
9

10 MR. LORY: Does your Honor want me to do that?

11 THE COURT: Do that.

12 MR. LORY: All right, but I didn't volunteer  
13 that before.

14 THE COURT: My understanding was somebody was  
15 going to do that.

16 All right, that's all for today.

17 (Court adjourned to May 30th, 1974 at  
18 10:00 a.m.)

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1  
2 MARIA IANNUZZI, Administratrix of  
3 Estate of Mario Iannuzzi, Deceased  
4 Plaintiff

5 vs.

6 SOUTH AFRICAN MARINE CORP.,  
7 Defendant and  
8 3d Party Plaintiff

9 vs.

10 INTERNATIONAL TERMINAL OPERATING  
11 CO., INC.,  
12 3d Party Defendant

13 May 30, 1974,  
14 10 A.M.

15 (Trial resumed)

16 --

17 (In the robing room - all counsel present.)

18 THE COURT: There are several unfinished pieces  
19 of business.

20 Mr. Lory, I have studied the statute and applied  
21 it to Exhibit 19 for identification and I will exclude 19  
22 for identification based on the statute.

23 MR. LORY: Despite the fact, your Honor, that  
24 it is an admission of a prior inconsistent position? That's  
25 all I offer it for, a prior inconsistent position.

THE COURT: I don't think the statute admits it  
being used for any purpose. Therefore, I will exclude it.

MR. LORY: For the record, your Honor, my position  
is that it is a prior inconsistent position. It is not being

1 rgh

2 offered as evidence, but just as a statement against in-  
3 terest because of the prior inconsistent position stated  
4 there as opposed to the position taken at the trial.

5 THE COURT: All right.

6 Mr. Cohen, going to the questions that you wanted  
7 to read to the jury from Mrs. Iannuzzi's deposition, I find  
8 this a very troublesome situation because it has a certain  
9 surface appeal for jury consideration, but I am frank to  
10 say that I cannot see a basis for admitting it. Now, I  
11 would be pleased to hear you on why it should be admitted  
12 or any legal authority that would support it. Let me give  
13 you the basis I touched. If this were Iannuzzi himself who  
14 said a board hit me, we would have no question, but the  
15 problem is we don't have that. We have merely a lawyer  
16 whose source is unexplained telling a client that that's  
17 his understanding of what happened. Now, we have neither  
18 his source nor the time this is stated. Therefore, I can  
19 see that if there were some issue to which Mrs. Iannuzzi's  
20 state of mind was relevant, this would be clearly admissible,  
21 but as proof of the fact that a board hit her husband on  
22 the head, I don't see how this is an admission against  
23 interest that can be used.

24 MR. COHEN: My thinking was this, your Honor:  
25 if Mr. Lory, for example, at any time during the course of

1 rgh

2 this trial, on the opening, for example, had stated to this  
3 jury that Mr. Iannuzzi was hit on the head by a falling  
4 board, the plaintiff's case would be stuck with that state-  
5 ment of his. They would be bound by it and at the end of  
6 the case if he wanted to adopt a different position he  
7 wouldn't be precluded, but nonetheless the jury would have  
8 the benefit of knowing that he had earlier espoused a prior  
9 inconsistent position. Now, the fact that this comes out  
10 not in open court but on a deposition of the party to my way  
11 of thinking makes no change. They have been presenting  
12 this case for the last couple of weeks on the theory that  
13 there was a slug of air in a winch that caused this accident.  
14 They have made no reference at all to the presence of any  
15 carpenters. They have produced witnesses who have told  
16 this jury that carpenters were not present at the hatch,  
17 and yet it turns out that when Mrs. Iannuzzi spoke to her  
18 lawyer about how her husband was killed, he told her that  
19 he was killed by a falling piece of lumber. To me it is  
20 highly significant and very relevant to the way this case  
21 has been tried before this jury. Certainly Mr. Lory was  
22 arguing a few moments ago that he wanted to admit the first  
23 report of accident because of a prior inconsistent position.  
24 That report is excludable only by reason of the statute,  
25 but certainly here we have evidence that is not excludable

1 rgh

2 by any statute of a prior very inconsistent position which  
3 the plaintiff has adopted.

4 Now, the weight which the jury wants to give this  
5 is up to them to determine, but it certainly is relevant,  
6 I think, to the issues in this case and the manner in which  
7 the case has been presented to the jury. It is something  
8 that they may or may not want to consider in their judgment,  
9 but I certainly think it should be admissible for them to  
10 decide how they want to view it.

11 MR. LORY: If your Honor please, she was asked  
12 prior to stating anything whether she had any knowledge of  
13 the act and she stated categorically no. Everything else  
14 that follows is hearsay.

15 THE COURT: That's the way I followed the testimony.  
16 Mr. Cohen's position is certainly well taken. Frankly it  
17 doesn't change my mind on the admissibility of it, but the  
18 position is well taken. I am somewhat of the view that the  
19 record already establishes to a certain degree the facts  
20 that he wants to argue, specifically that you and Mr. Andre  
21 had a meeting at a hamburger stand long ago and you knew of  
22 these facts. That permits the inference that you want to  
23 draw here --

24 MR. COHEN: This goes back even further. It  
25 goes back years.

1 rgh

2 THE COURT: Mr. Cohen, let's suppose for argument  
3 sake right up-- the complaint alleges negligence and un-  
4 seaworthiness in a general way and let's suppose that right  
5 up to the day of the trial the plaintiff is unaware of  
6 a witness who has an eyewitness version of what happened  
7 that is still negligence or still unseaworthiness. Would  
8 you not say that that could be adduced on the trial? I would  
9 think so.

10 MR. COHEN: Certainly.

11 THE COURT: Even if it changed the position  
12 they have formerly taken?

13 MR. COHEN: That's right.

14 THE COURT: I think the same thing is true here  
15 with the lawyer's statement to her that a board hit him  
16 on the head.

17 MR. COHEN: Except the converse of what we both  
18 just agreed upon should equally be agreed upon. Here we  
19 don't know of an eyewitness and here we have them knowing  
20 of it, knowing of his this accident was caused and here we  
21 have the lawyer advising the client how the accident was  
22 caused, but he goes ahead and sues someone else on a com-  
23 pletely different theory. Now, I think the jury has the  
24 right to have that before them in considering the claim that  
25 Mr. Lory is now going to mouth against the ship owner. The

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2 fact that his boss, Mr. Gritz, told his own client that this  
3 accident was caused by falling lumber; that is certainly  
4 inconsistent that this is contradictory of what Mr. Lory  
5 comes in to claim.

6 THE COURT: I don't disagree with the emotional  
7 pull that you have here. I am reluctant to admit this is  
8 proof of the fact or even as an inconsistent statement.

9 Let me give further consideration to this.

10 MR. COHEN: Let me just ask this. My under-  
11 standing always has been that regardless of the relief  
12 that may exist between themselves, that is to say between  
13 lawyers and client, that the client is bound by statements  
14 made by her attorney.

15 THE COURT: That is a public statement, not a  
16 statement to her in an office where they are discussing  
17 the merits of the case. Frankly, if Mrs. Iannuzzi hadn't  
18 blundered an unresponsive answer, the attorney-client  
19 privilege lay to this conversation.

20 MR. COHEN: It was never raised. It still hasn't  
21 been up to this moment.

22 MR. LORY: I raised it. There has been corrections  
23 with respect to that transcript which have not been given  
24 to your Honor.

25 THE COURT: I understand your position. Let me give

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2 further thought to this for the next five or ten minutes  
3 while we get into this.

4 On the issue of the motions--

5 MR. LORY: Excuse me, your Honor, with respect  
6 to the motion directed to the claim of negligence, before  
7 your Honor rules on it may I just say one thing?

8 THE COURT: Yes.

9 MR. LORY: The manual refers to longtime running.  
10 The manual in and of itself deals with electric hydraulic  
11 deck machinery. Now, while Mr. Napolitano made mention  
12 that his understanding of it was longtime running of the  
13 ship, the manual does not refer to longtime running of the  
14 ship, and if it were to be explained in any manner other  
15 than what is stated within the manual itself which deals  
16 solely with the winches, then it was incumbent upon someone  
17 to come into court to explain what is meant by the manual  
18 that it relates to something apart from the winches. When  
19 this manual says that it is subject to phase adjustment  
20 after longtime running it refers --

21 THE COURT: Phase adjustment is something  
22 different than an air pocket.

23 MR. LORY: Phase adjustment results from  
24 the air pocket present in the system. In other words, it  
25 throws the system out of synchronization.

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2 THE COURT: Yes, but we have no testimony that  
3 prior to this particular hoist there was any maladjustment  
4 of phase.

5 MR. LORY: What we are saying, your Honor, is  
6 that with respect to the claim of negligence, we have  
7 constructive notice in that as your Honor pointed out, your  
8 Honor had the impression that the longshoremen, if I may  
9 quote you, and I hope I am quoting you correctly -- that  
10 the longshoremen ran the hell out of these winches for two  
11 days.

12 THE COURT: Yes, they were working them very, very  
13 hard. Absolutely.

14 MR. LORY: Fine. In this particular basis the  
15 manual says longtime running and the ship was under a duty  
16 at that particular time to make certain that they continued  
17 to run properly.

18 MR. KAIN: I don't follow that.

19 THE COURT: I don't follow that argument at all.

20 MR. LORY: If the manual sets forth a warning  
21 as to what may occur following longtime running of the  
22 winches and the ship owner certainly is aware of the time  
23 consumed with respect to the operation of these winches over  
24 the 23rd and the 24th; that the people were under a duty  
25 at this particular point to insure the fact by inspection

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2 that they continued to run as they were supposed to run.

3 MR. KAIN: There is no testimony in this record  
4 that I know of, your Honor, that says two days shall con-  
5 stitute long term running and that an that an overhaul  
6 of the winch is then required --

7 THE COURT: At 7:15 on Sunday night.

8 MR. KAIN: There is no testimony in this record,  
9 I am sure of this, that this winch or these controllers  
10 were in any way out of phase, or that the phase adjustment  
11 valve was in the wrong position or hadn't functioned properly.

12 MR. COHEN: The actual testimony is that they  
13 had no trouble with this winch at all except for that one  
14 incident at 11:15 or 11:30 in the morning with relation  
15 to the stiff handle and at least from that time up to this  
16 accident, all the witnesses said the winch worked well.

17 MR. KAIN: I submit that both experts conceded that  
18 an air slug or an air pocket in the system would not result  
19 in the winch handles sticking or the control handles sticking.  
20 I don't follow the thrust of the argument.

21 THE COURT: I understand what you are saying,  
22 Mr. Lory. I am sorry to say it doesn't move me in this  
23 regard. I am going to withdraw from the jury the negligence  
24 count, or the count insofar as it alleges negligence, but I  
25 am going to submit to the jury the unseaworthy count.

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MR. LORY: For the record, exception.

THE COURT: Therefore, to the extent there was a motion to dismiss at the close of the plaintiff's case and motions for directed verdicts at the close of all of the proof on the negligence count, those motions are granted. With respect to similar motions with regard to the unseaworthy aspect of the count are denied.

MR. KAIN: If your Honor please, before we leave that particular topic, since the jury was told by Mr. Lory in the opening statements that it was their contention of negligence, and since he spent some time about the ship's negligence, may I ask your Honor for an instruction to the jury with respect to that.

THE COURT: I was going to ask you if you wanted me to do that.

MR. KAIN: Yes.

THE COURT: I was going to tell them that.

Incidentally, I note from reading the transcript, Mr. Cohen, that I did strike the testimony with regard to the winch handle being pushed farther, but I then find at a subsequent page Mr. Ferenczy saying because the air was under compression it might over-respond due to vibrations and cause the over-reaction that he claimed occurred. Whether the jury gives full credit to that or not is not my

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2 province, it is their province.

3 MR. COHEN: That's true.

4 THE COURT: I feel, therefore, that I must deny  
5 the motion to strike the testimony of Mr. Ferenczy. Let  
6 me give you the transcript back here, Mr. Kain. I have some  
7 clips in there which you can leave in or take out at your  
8 pleasure.

9 Let me suggest this: Mr. Kain, I will state to  
10 the jury as follows:

11 While proof has been offered by plaintiff on the  
12 issue of the vessel's negligence, I have withdrawn that  
13 issue from your consideration for reasons that are not  
14 part of your consideration. I shall submit the case to you  
15 only on the issue of the seaworthiness of the vessel, as  
16 to which I shall charge you fully in a few minutes.

17 MR. KAIN: If your Honor please, am I not entitled  
18 to a charge to this jury that plaintiff has failed to prove  
19 his allegations of negligence as outlined in his opening  
20 remarks and as pleaded in his complaint?

21 MR. LORY: The only way his Honor could do that  
22 would be to make mention to the jury that the actual  
23 difference between the claim of negligence and unseaworthi-  
24 ness would be notice upon the ship.

25 MR. COHEN: Why couldn't he just make the simple

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2 statement that Mr. Kain suggests, which is a very simple  
3 statement of actual fact. You have failed to sustain your  
4 burden of establishing a prima facie case of negligence  
5 and, therefore, it is dismissed.

6 MR. KAIN: What troubles me about it, your Honor,  
7 is that the statement has offered proof; that's one of the  
8 things that seems to me that the granting of the motion is  
9 necessarily based on the fact that as a matter of law he  
10 did not.

11 THE COURT: I think you are right.

12 MR. LORY: I think your Honor might mention the  
13 fact that we had failed to prove notice of the vessel -- on  
14 the vessel of the defect. This way when they hear it --

15 THE COURT: That leaves the jury considering  
16 whether or not I have made a finding that there was in fact  
17 a defect, which I don't want to do either.

18 MR. KAIN: That's correct.

19 THE COURT: Well, then, let me try something else.

20 The plaintiff has claimed that there was negligence  
21 on the part of the vessel. I have ruled as a matter of  
22 law that there was a failure of proof in support of that  
23 claim and I am withdrawing it from your consideration.

24 MR. KAIN: Thank you, sir.

25 THE COURT: Mr. Lory, I think that is as neutral

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a statement--

MR. LORY: All right, Judge.

THE COURT: Mr. Cohen, on the question of counsel fees back and forth, in accordance with Close v. Calmar, which you undoubtedly are familiar with, 44 FR3, I am going to sever the counsel fee claims as they may be until the case is entirely terminated, appeals and all. I take it that you yesterday in effect were making a motion to sever that claim.

MR. KAIN: That's correct, your Honor. I made it originally on written papers to your Honor before the commencement of the trial.

THE COURT: I don't recall it because a lot has happened, but I am sure that you are correct and I am going to grant the severance. We will hear those issues at a subsequent time in accordance with the Close case.

MR. COHEN: May I just note my exception for the record?

THE COURT: Surely.

MR. LORY: Your Honor, I note that you have a proposed charge in. Does that include an explanation to the jury as to the difference between direct evidence and circumstantial? I would request that your charge does include something with respect to that in view of Dr. Di Maio's

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2 testimony.

3 MR. KAIN: What is circumstantial about Dr. Di  
4 Maio's testimony?

5 MR. LORY: His opinion.

6 THE COURT: That is opinion evidence.

7 MR. KAIN: It doesn't make any difference.

8 MR. LORY: It is predicated upon facts that he  
9 did not see, upon a premise he was told.

10 THE COURT: No. Circumstantial evidence is  
11 where you establish a fact and on the basis of that fact  
12 you are entitled to infer another fact.

13 MR. LORY: Don't we have this here? We have a  
14 hearsay statement with respect to the manner of the occurrence  
15 based upon that another fact was established in opinion,  
16 to be exact.

17 MR. COHEN: He performed an autopsy and made  
18 certain personal findings.

19 THE COURT: The doctor's testimony is opinion  
20 evidence and I will charge the standard by which the jury  
21 shall evaluate opinion evidence.

22 MR. COHEN: Only part of it was opinion evidence,  
23 though.

24 THE COURT: His opinion that the skull wound was  
25 consistent with a piece of lumber falling on the head, or,

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2 turned around, as Mr. Lory said, if the man had fallen  
3 squarely on top of his head it could have done the same  
4 thing, so we have a Mexican standoff.

5 MR. COHEN: But the actual physical findings  
6 on the autopsy is not opinion evidence.

7 THE COURT: No, I appreciate that.

8 MR. LORY: Your Honor, I think one thing remains.  
9 Mr. Kain, I had my secretary call Mrs. Triffeletti. So the  
10 record is clear, she is the supervisor at the compensation  
11 department of the New York Shipping Association-ILA com-  
12 pensation department. She tells me that the rate of pay  
13 for longshoremen and hatch bosses is the same. This is the  
14 information I got.

15 MR. KAIN: That's the point that I raised initially  
16 when the point arose, that it was my contention that they  
17 were the same.

18 THE COURT: May that go into evidence with respect  
19 to the two years.

20 MR. KAIN: There was no dispute, your Honor, with  
21 respect to the accuracy of the information and in view of  
22 Mr. Lory's statement on the evidence, I am willing to let  
23 it go in as a witness of the hourly rate pay.

24 THE COURT: Then the exhibit may be received.

25 Is it an innocuous covering letter, because the

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1 jury may well ask for these exhibits.

2 MR. KAIN: I don't think there is any objection  
3 as I remember it.

4 THE COURT: All right, it may be received.

5 (Plaintiff's Exhibit 17 received in evidence.)

6 THE COURT: Now, I want to get to some things  
7 on the charge, and you touched on one already.

8 Mr. Lory, I am going to turn to you for a minute.

9 MR. COHEN: Can I be excused for a moment to get  
10 the rest of my bag, your Honor?

11 THE COURT: By all means.

12 (Discussion off the record.)

13 THE COURT: So we are clear, Mr. Cohen, I think  
14 feeling that the law excludes it, and even as a matter of  
15 discretion, I think I am going to exclude Mrs. Iannuzzi's  
16 testimony as to what her lawyer told her.

17 MR. COHEN: All right.

18 THE COURT: You may preserve your exception to  
19 that ruling.

20 Mr. Lory, your charge number 16. I am not quite  
21 clear as to why you want me to charge these two sections  
22 of the regulations.

23 MR. LORY: I withdraw it.

24 THE COURT: All right.

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2 Coming to something that I will need your help  
3 and Mr. Kain's help on, Mr. Kain gave me some questions  
4 to be given to the jury in typed form for them to answer  
5 in writing. You probably have seen them, haven't you?

6 MR. MOLANPHY: We gave you a copy yesterday.

7 (Pause)

8 THE COURT: This is Mr. Kain's proposed special  
9 questions for submission -- which I am going to give, but  
10 I have trouble with number 4, which is now number 3 and  
11 let me tell you what my trouble is.

12 MR. LORY: Before you get to that, your Honor,  
13 I request you amend number 2 by including therein, since  
14 they put in the expression "sustained their burden of  
15 proving"; I think you should add "by a preponderance of  
16 the evidence" so we don't get confused with "beyond a  
17 reasonable doubt". So it reads "Have plaintiffs sustained  
18 their burden of proving by a preponderance of the evidence  
19 that the Huguenot was unseaworthy in the manner contended."

20 MR. KAIN: Let's assume that your Honor will  
21 charge the burden.

22 MR. LORY: If the interrogatory is there, it  
23 should also be included in the interrogatory.

24 THE COURT: I don't think I will do that, no, because  
25 my charge on the preponderance of the evidence is a matter of

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2 three or four paragraphs coming at it different ways and  
3 I think that --

4 MR. LORY: I think your Honor is compelled to,  
5 with due respect, in order since the question puts in the  
6 burden of proof. The usual situation was was the vessel  
7 unseaworthy as the plaintiff contends; that would be the  
8 usual question.

9 MR. COHEN: Not so.

10 THE COURT: Yes, that is the way Judge Weinfeld  
11 usually submits it to the jury.

12 (Pause)

13 THE COURT: Judge Weinfeld's standard submission  
14 to the jury is "Do you find that blank has established  
15 his claim of unseaworthiness."

16 That is the way he puts it.

17 MR. LORY: If you put it that way I have no  
18 objection.

19 THE COURT: I don't see why you have objection  
20 to the way it is.

21 Let's number these so we know what we are talking  
22 about.

23 MR. LORY: With respect to number 1, since the  
24 expression burden of proving is there I make the request.  
25 If your Honor is going to use Judge Weinfeld's form --

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2 THE COURT: No, I am going to use that form.

3 MR. LORY: Then I would request since you are  
4 going to use the burden of proving, then you should set  
5 the standard as well.

6 THE COURT: I will say by a preponderance of  
7 the evidence as charged.

8 MR. COHEN: Preponderance of the credible  
9 evidence?

10 THE COURT: No.

11 Off the record.

12 (Discussion off the record.)

13 THE COURT: Since we are getting into this, I  
14 am going to give Judge Weinfeld's, and that will solve  
15 the whole problem. "Do you find that Mrs. Iannuzzi has  
16 established her claim of unseaworthiness."

17 MR. COHEN: How about in the manner contended.

18 THE COURT: In the manner contended. All right.

19 Now, let me go to now number 3, which is my  
20 problem. You, Mr. Kain, have submitted this to me asking  
21 for a total amount from the jury, if they reach that, to  
22 give a lump figure. Mr. Lory in his instructions 22 through  
23 27 -- his requests 22 through 27 asks for a lump figure.

24 MR. LORY: No, I asked for a divided figure;  
25 a figure with respect to today -- from the date of accident

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2 to today so interest can be computed and a figure for  
3 future damages.

4 THE COURT: The problem that I see is that both  
5 Judge Weinfeld and Judge Gurfein in that Nye case get into  
6 a very, very detailed breakdown, which frankly is going to  
7 require all future juries to have accountants on them before  
8 they can figure out, because you not only have the break-  
9 down, I then assume somebody is going to want me to charge  
10 the discounting by 5 per cent of the future damages.

11 MR. KAIN: May I say to your Honor with respect  
12 to the Nye case, which as your Honor knows was a non-jury  
13 case, that was, of course, Judge Gurfein's computations,  
14 but we submitted rather exhaustive briefs offering legal  
15 substantiation for the fact, for example, that the deceased  
16 being a member of the household, even though Mrs. Nye had  
17 testified that he gave her virtually all of his money, we  
18 submitted I think Judge McGohey's computations on the  
19 Mormackite case, and it escapes me how you could possibly  
20 do this with a jury in a charge.

21 THE COURT: I know that, but the problem that I  
22 see is that why should the determination be different because  
23 the trier of the fact is a jury as opposed to a judge.

24 MR. COHEN: Because there is an interest. He is  
25 right in this sense. Interest will attach to the recovery

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2 and it shouldn't have been interest that would have been  
3 recovered by a plaintiff until four years in the future.

4 THE COURT: I agree with this, and that is why  
5 when Mr. Kain submitted a request for one lump sum of damages  
6 for everybody regardless of when the jury found it, it  
7 seemed to me that that was an over-simplification.

8 MR. KAIN: It is. I will concede that, your Honor.

9 THE COURT: We have to go farther than that.

10 MR. COHEN: Why shouldn't it be to date and then  
11 in the future.

12 THE COURT: What I had in mind to do and let me  
13 ask you this. I had in mind to make number 3 read as follows:  
14 If your answer to number 2 is yes, what is the total amount  
15 of a) past damages sustained by (i) Mrs. Iannuzzi, (ii)  
16 Teresa, (iii) Salvatore.

17 b) Future damages sustained by 1, 2 and 3.

18 MR. COHEN: The son has reached the majority.

19 THE COURT: The son has reached majority.

20 Future damages suffered by Mrs. and Teresa.

21 MR. COHEN: Well, Teresa is almost--

22 THE COURT: I am going to charge that the period  
23 runs against her at such and such a time. Don't I have to do  
24 that in that fashion?

25 MR. KAIN: I believe so, sir.

1  
2 THE COURT: And ask them to give a breakdown.  
3 For example, I presided over an automobile accident case  
4 here a month or two ago and the jury brought in separate  
5 verdicts as to the mortgage and each of three daughters and  
6 the husband. Now, the only difference here is that Mrs.  
7 Iannuzzi is suing for the children in a representative  
8 capacity and she is suing for herself both representatively  
9 and individually, so her figure I assume would be a lump  
10 figure that the estate attorney would have to deal with  
11 the breakdown should it be awarded.

12 MR. KAIN: Yes, except I agree with Mr. Cohen  
13 that it should be to date and then in the future.

14 THE COURT: Should I amend the question then  
15 to read as to the three of them to date and as to Mr.  
16 Iannuzzi and Teressa in the future?

17 MR. COHEN: All right. Will you tell them they  
18 need not reach that question if they decide 1 or 2  
19 in the negative?

20 THE COURT: I shall. It's only if they answer  
21 2 yes that they get to that.

22 MR. KAIN: And I assume that your Honor intends  
23 to give this to the jury in the form of written question.

24 THE COURT: I am going to have this retyped and  
25 I will give it to them in this fashion.

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2 MR. COHEN: I have a problem with 4, your Honor.  
3 I think that should be "Has the defendant sustained its  
4 burden of proving decedent contributorily negligent.

5 MR. KAIN: All right.

6 THE COURT: All right. How do you want that?

7 MR. COHEN: Has defendant sustained its burden  
8 of proving the decedent contributorily negligent.

9 THE COURT: In the manner contended?

10 MR. COHEN: Yes.

11 Then there should be another one after that along  
12 the lines of 2, if so, was such contributory negligence  
13 on the part of the decedent a substantial factor in causing  
14 this accident?

15 THE COURT: This is for the vessel as opposed to  
16 the plaintiff.

17 MR. COHEN: Hewants to use the result of this  
18 on a motion he is going to make against me.

19 THE COURT: He isentitled to that.

20 MR. COHEN: Then if he relies on this finding, we  
21 should have a further finding as to whether or not that  
22 contributory negligence was a further factor in causing  
23 the accident.

24 MR. KAIN: I disagree on that.

25 MR. COHEN: I don't know. It may not have been.

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2 THE COURT: I think that we could put that question  
3 to the jury a second time, but I think he is entitled to  
4 ascertain --

5 MR. COHEN: I am not disagreeing with that but  
6 just as we have number 2 following number 1 asking for  
7 a proximate cause following the unseaworthiness so we should  
8 find out if there is a proximate relationship between any  
9 contributory negligence and the accident.

10 THE COURT: That's in my charge.

11 MR. COHEN: But it is not in the special verdicts  
12 that your Honor is proposing to submit.

13 THE COURT: I will change this to: has defendant  
14 sustained its burden of proving decedent contributed to  
15 the accident in the manner contended.

16 MR. COHEN: No. He may have contributed without  
17 negligent.

18 THE COURT: Mr. Cohen, I think you are getting--  
19 you are certainly entitled to that finding as between you  
20 and the vessel, but the vessel is entitled to the percentage--

21 MR. COHEN: Absolutely. Yes.

22 THE COURT: What you are asking for is a finding  
23 on that side that is not relevant to the jury's deliberations  
24 on this issue to avoid what you feel is an adverse leg  
25 up on your side.

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2 MR. COHEN: It is, and I am surprised Mr. Lory  
3 isn't asking for it, but certainly a mere finding that the  
4 decedent was contributorily negligent without a further  
5 finding that that was proximately related to the happening  
6 of the accident is inadequate.

7 THE COURT: I think based upon my charge --  
8 obviously the negligence has to be related to the accident.

9 MR. KAIN: It may be implicit in your Honor's  
10 charge.

11 MR. COHEN: All I am saying, Judge, is that  
12 number 2 calls for a finding of proximate cause after they  
13 found unseaworthiness, and that also would be implicit  
14 in your Honor's charge. All I am saying is that number 4  
15 should be followed by another question similar to number 2.

16 MR. KAIN: Isn't that covered, in your opinion,  
17 in the definition of contributory negligence.

18 MR. COHEN: So is proximate cause covered in  
19 the definition of unseaworthiness.

20 THE COURT: I think I will leave it alone, because  
21 I am going to charge that the vessel contends that even if  
22 you find unseaworthiness was the cause of the accident,  
23 Mr. Iannuzzi himself contributed to his own injuries by  
24 his own carelessness and negligence, in which event damages  
25 must be reduced accordingly. That is what I am going to

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2 charge, and I think that makes it perfectly clear that the  
3 contributorily negligent is not some negligence in a vacuum  
4 that has no effect on the outcome of the case.

5 MR. COHEN: I am not getting through to your Honor.  
6 Your Honor is also going to charge that an unseaworthy  
7 condition, in order to give the plaintiff a recovery, must  
8 be proximately related to the accident.

9 THE COURT: Right.

10 MR. COHEN: Yet in the special verdicts, in the  
11 form we now have, number 2 asks for a specific finding on  
12 proximate cause in the event they should find unseaworthiness  
13 and your Honor is not saying that a finding of unseaworthi-  
14 ness in accordance with the charge would subsume the question  
15 of proximate cause. I am saying that to be consistent we  
16 should have after number 4, which asks for a finding on  
17 contributory negligence another inquiry similar to number 2  
18 to the effect that if your answer to number 4 is in the  
19 affirmative, then was such contributory negligence a proximate  
20 cause of the injury and death.

21 THE COURT: I think the problem you run into there,  
22 though, is that that gets even more confusing than before  
23 because the jury might conclude from what you want that  
24 the negligence must be the cause of his death.

25 MR. COHEN: A proximate cause. Oh, yes.

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2 THE COURT: All it has to do is contribute, it  
3 doesn't have to be the cause, it only has to contribute.

4 MR. COHEN: It must be a proximate cause.

5 MR. LORY: It must be proximate.

6 THE COURT: It must be a proximate contribution.

7 MR. COHEN: Right. It has got to be a proximate  
8 relationship.

9 THE COURT: All right, proximate contribution.

10 The word proximate contribution, which I have  
11 never used before but I am perfectly happy to use it if  
12 everybody is agreeable. I will make number 4 as follows:  
13 Has defendant sustained its burden of proving decedent con-  
14 tributorily negligent in the manner contended and that such  
15 negligence was a proximate contribution to his injuries  
16 and death.

17 MR. COHEN: That's fine.

18 THE COURT: Mr. Kain?

19 MR. KAIN: I would like to note on the record, your  
20 Honor, that I object to it as confusing to the jury. I  
21 believe that your Honor's charge on contributory negligence  
22 would cover Mr. Cohen. In effect what he is saying is it is  
23 at best repetitious and at worst it is confusing and it seems  
24 to me that it is confusing by definition, of course, con-  
25 tributory negligence has to contribute to the accident and

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2 I don't think that it either has to be the proximate cause.  
3 I am afraid that's what a jury might conclude.

4 MR. COHEN: I didn't suggest that it has to be  
5 the proximate cause, but it has to be a proximate cause  
6 in order to have any validity as a means of reducing the  
7 verdict.

8 MR. KAIN: I must say I never came across such  
9 a definition of it given to a jury before.

10 THE COURT: If I have to cut the Gordian knot,  
11 then I will not give it. I will let it ride on my charge  
12 in chief.

13 MR. COHEN: May I also then at this time ask your  
14 Honor -- I think I have to do it at this time to protect  
15 the record, your Honor, ask your Honor to submit to the jury  
16 a further special interrogatory or special verdict, a question  
17 to the effect of whether if they find the decedent was  
18 contributorily negligent, such contributory negligence was  
19 a substantial factor in bringing about the accident and  
20 I refer your Honor to the Lansetti decision which used just  
21 that language in a special verdict form. I have attached  
22 the Lansetti decision to my request to charge.

23 THE COURT: As between the plaintiff and the vessel?

24 MR. COHEN: Yes, sir. It relates to all parties.

25 THE COURT: Was it submitted to the jury all as one

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2 package?

3 MR. COHEN: I think so.

4 THE COURT: That's the difference, then.

5 MR. COHEN: Except that as I understood even  
6 yesterday in advance of any jury verdict Mr. Kain was moving  
7 for a directed verdict against my client on the grounds  
8 of an anticipated verdict. If he is going to be permitted  
9 to make motions on a partial form of verdict covering only  
10 some of the issues, then I submit it is improper and we  
11 should have, if we are going to use this verdict in connection  
12 with the claim over, we should have findings on whether  
13 or not any contributory negligence on the part of the  
14 decedent was a substantial factor in causing the accident  
15 and was proximately related to it.

16 THE COURT: I will submit that to them if you want  
17 in regard to the second submission to the jury.

18 Now, gentlemen, is there anything else, because it is  
19 almost 11 o'clock and this jury has got a lot of work and  
20 we have got a long way to go.

21 MR. LORY: I just wanted to cover one thing, your  
22 Honor. Your number 1 will follow Judge Weinfeld's form?

23 THE COURT: It will.

24 MR. LORY: In reading to Mr. Cohen from the  
25 charge or the proposed charge that you have you stated

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2 affirmatively that Mr. Iannuzzi was affirmatively negligent.  
3 I don't think you will do that during the course of the  
4 charge.

5 MR. COHEN: What?

6 MR. LORY: When you read the excerpt with respect  
7 to contributory negligence, I heard -- and I hope I am in  
8 error, that your Honor had stated there were no qualifica-  
9 tions Mr. Iannuzzi was contributorily negligent --

10 THE COURT: No, that was the defendant's con-  
11 tention.

12 MR. LORY: I'm sorry.

13 THE COURT: All right, let's go forward on this.

14 MR. COHEN: How about the discount table, your  
15 Honor?

16 THE COURT: Yes, that's right.

17 MR. COHEN: Would it be helpful just to take  
18 a verdict on the legal issues first?

19 THE COURT: Then we might have three verdicts.

20 How is this: As to any future aware, you should  
21 discount any award for future damages, you shall discount  
22 that award by 5 per cent to give it a present value.

23 MR. COHEN: Shouldn't it be 6 per cent?

24 THE COURT: Well the Court of Appeals has said 5.

25 MR. COHEN: The savings banks now give you 6.

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2 and I don't think that means anything to them. If we had  
3 the discount figure.

4 MR. KAIN: I believe, your Honor -- I am not  
5 familiar with the statute, but I believe the New York  
6 statute now makes it 6 per cent and I wonder if the Court  
7 of Appeals -- if this would change their 5 per cent. I must  
8 confess I am not familiar with the section I am referring to,  
9 but I believe the New York statute has put in 6 per cent  
10 as a discount rate.

11 THE COURT: Then I will charge not less than 5 per cent  
12 MR. COHEN: But that just means to them, I think, that they take  
13 5 or 6 per cent off whatever the amount is.

14 THE COURT: I know, Mr. Cohen, but I don't have  
15 any authority in the law to give me any other figure. Mr.  
16 Lory is going to claim I have taken 1 per cent away from  
17 him on this.

18 This is a 1971 case in the Second Circuit and I  
19 think I will follow it.

20 All right. Anything else that anybody can think of?

21 MR. COHEN: I am not talking about the percentage  
22 be it 5 or 6, but Mr. Iannuzzi would be about 48 and he  
23 would have had a working life expectancy of another 17 years  
24 and the present value of one dollar a year for the next 17  
25 years discounted at the rate of either 5 or 6 per cent has

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2 a certain numerical factor and there are tables that give  
3 that factor. It is not \$17 take off 6 per cent. It is a lot  
4 different than that. I am just wondering if your Honor has  
5 those discount tables. There is a form I have seen a lot of  
6 judges have and I think we have one back at the office.  
7 It is a sliding table and it shows the life expectancies,  
8 working life expectancy and the present tables at different  
9 discount rates.

10 MR. LORY: If your Honor please, I think it  
11 should go to the jury just as your Honor stated, without  
12 getting complicated by tables prepared by firms who are  
13 seeking to sell gadgets to attorneys.

14 THE COURT: All right, gentlemen, let's go  
15 forward.

16 (Jury present.)

17 THE COURT: Good morning, ladies and gentlemen.  
18 The lawyers and I have been busy since 10 o'clock, so I trust  
19 you will understand that we have done our part and it is soon  
20 to become your work.

21 Now, before counsel commences their summations  
22 to you I want to state as follows:

23 The plaintiff in this case has claimed that there  
24 was negligence on the part of the vessel. I have ruled  
25 as a matter of law that there was a failure to prove in

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2 support of that claim and I am therefore withdrawing  
3 that claim from your consideration. Therefore, you will  
4 not have before you any claim of negligence on the part  
5 of the vessel. I will submit to you another claim in  
6 the course of my charge, as to which I will give you express  
7 direction on the law.

8 All right, sir, Mr. Cohen, if you will.

9 MR. COHEN: Thank you, your Honor. May it  
10 please the Court, Mr. Foreman, ladies and gentlemen of  
11 the jury:

12 All the testimony in this case has now been  
13 given. All the documentary proof has been put in the record  
14 and very soon it will become time for you folks to retire  
15 to the jury room and deliberate and decide the fact issues in  
16 the case.

17 Before you do that, however, the lawyers are given  
18 an opportunity to talk to you to discuss --

19 THE COURT: Mr. Cohen, I hate to interrupt you  
20 on a matter that I should have discussed earlier. This has  
21 nothing to do with your summation, sir.

22 Ladies and gentlemen, what we are going to do is,  
23 as I told you at the outset of the trial, there are two  
24 lawsuits here being combined for consideration by this one  
25 jury. What I am going to ask you, ladies and gentlemen, to

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2 do is to make a determination first as to the issues  
3 between the plaintiff and the vessel and then upon the  
4 resolution that you may of those issues we will then, if  
5 appropriate, go on to resolution of any issues that may  
6 exist as between the vessel and the stevedoring company.  
7 So you are going to be first asked to consider only those  
8 issues that exist between the plaintiff and the vessel.  
9 Following that consideration, if appropriate, you will then  
10 be given a further charge upon the law as to consideration  
11 of any issues between the vessel and the stevedores. So  
12 what counsel are addressing you now on are solely the issues  
13 that exist between the plaintiff and the vessel itself.

14 Mr. Cohen, go ahead, sir. I am sorry to interrupt  
15 you. You may start again so you will have the continuity  
16 that you wish.

17 MR. COHEN: No, I think I remember where I was.

18 What happens, though, at the end of all the proof  
19 is the lawyers from each side can talk with you and discuss  
20 with you what they think the proof is as established. After  
21 that is done his Honor will charge you what the rules of  
22 law are and whether you agree or disagree with what the laws  
23 are, you must accept them as given them to you by his Honor.  
24 Everybody who takes part in the trial has a different  
25 function, and the court's function is to tell you what the

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2 law is, as well as to keep peace and order among the lawyers  
3 and so on. Your function is to decide the facts and that is  
4 your function alone. Nobody else can tell you what the facts  
5 are; not the court or lawyers. You decide.

6 Now, in the course of discussing with you what  
7 I think has been established by the proof in this case I,  
8 of necessity, have to discuss with you what various witnesses  
9 said. If anything I say to you about what a witness has  
10 said does not jive with your recollection of what he said  
11 disregard what I say. You go by your own recollection of  
12 what a witness testified to. Don't let me say something  
13 that you think is different; don't let Mr. Kain and don't  
14 let Mr. Lory. You probably will find that a number of  
15 people sitting in the same room listening to the same people  
16 over a period of time may have different recollections  
17 as to just what was said, but nonetheless you are the judges  
18 of the facts, each and every one of you, and you go by your  
19 own recollection. If I should say something that doesn't  
20 jive with your recollection, please forgive me. I am not  
21 trying to deceive anybody. You go by your own recollection.  
22 I tell you this in advance.

23 Now, it strikes me that what we have here is a claim  
24 presented by Mr. Lory that the accident of November 24, 1968,  
25 was, he says, caused by an unseaworthy condition on the ship.

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2 More specifically, he says it was caused because there  
3 was a slug of air in the winch which caused the winch to  
4 malfunction and because of that the automobile was being  
5 taken aboard swung downward and across the ship out of  
6 control, striking Mr. Iannuzzi on his back and throwing him  
7 down into the hatch below.

8 Now, you may be thinking to yourself, and I  
9 wouldn't blame you, that "I have never been aboard a ship  
10 before. I have heard a lot of talk in the last couple of  
11 weeks about nautical terms like port, starboard, booms,  
12 guys, preventers, planes of falls and there have been models  
13 and pictures and all that and nonetheless I am not really  
14 sure I grasp it all because there is an awful lot involved  
15 to grasp" and some of you may be wondering "How do I decide  
16 this case? I am not really a maritime or a seaman expert.  
17 I have heard some testimony from a doctor. I maybe don't  
18 understand all of that." It is very hard to grasp in a very  
19 short compressed period of time all that the people are  
20 talking about and you may be wondering "How do I decide the  
21 case?" The answer really is that you decide this case on  
22 the basis essentially of your common sense. The whole purpose  
23 of the jury system is to present disputes in an orderly  
24 fashion in the hope that truth will come out and you present--  
25 each side presents its understanding of what occurred, it is

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2 proof to a jury comprised of people drawn from the com-  
3 munity, such as yourselves, of alternate walks of life.  
4 There is one thing that you have got in common. You have  
5 all been living in a congested urban area for a number of  
6 years. Every day each one of you comes into contact with  
7 people. Every day that you have lived each one of you had  
8 certain life experiences and you are passing judgments all  
9 the time. The overall accumulation of your life experience  
10 results in what we all call common sense. You don't decide  
11 these cases any differently than you would decide things  
12 in your own life. You use common sense. You don't leave  
13 it outside the court and apply some esoteric type of  
14 reasoning just because you are sitting now as a juror.  
15 You use your common sense. What do you apply your common  
16 sense to? You are not allowed to apply it, and you can  
17 understand why, to speculation or conjecture. You apply  
18 your common sense to the evidence that came into this court-  
19 room during the course of this trial. You decide this case  
20 on the basis of that evidence, not on the basis of anything  
21 else.

22 In addition to the actual evidence you are  
23 permitted to draw reasonable inferences from the evidence  
24 and use that. Now, what do we mean by that? Supposing  
25 you are in an apartment and the blinds are down and the shades

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2 are drawn and somebody rings the bell and they come in the  
3 door and they are wearing rubbers that are sloshing wet  
4 and they have got a raincoat on dripping with water and they  
5 are carrying an umbrella from which water is leaking down.  
6 You haven't seen it is raining out because the blinds are  
7 drawn, but it is a fair inference from somebody coming into  
8 your apartment in that fashion -- it is a fair inference  
9 that it is raining outside and that's what we talk about  
10 when we are talking about fair inferences.

11 In this case it seems to me you have got initially  
12 a very strong conflict between the witnesses as to how  
13 the accident happened. Mr. Lory, as I have indicated,  
14 contends that Mr. Iannuzzi was standing up on the main deck  
15 and there was something that suddenly developed wrong with  
16 the winch which caused the draft to swing across, hitting  
17 him somewhere in the back and knocking him down into the  
18 hatch below. We, on the other hand, believe that this  
19 accident happened because Mr. Iannuzzi was standing on the  
20 upper tween deck, not the main deck, and because carpenters  
21 were working on the main deck dropping lumber down to each  
22 other and that one of those pieces of lumber dropped down  
23 by this carpenter struck Mr. Iannuzzi in the head and killed  
24 him. That, it seems to me, is primarily the first issue  
25 you have got to resolve in your own mind, and let me start

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2 to address myself to that issue, which is just how did this  
3 accident happen; where was Mr. Iannuzzi and how did it occur.  
4 At home last night trying to think of how I would present  
5 this to you it struck me that of all the witnesses who came  
6 to court to testify there was just one witness who by  
7 no stretch of anybody's imagination could be said to be  
8 biased or prejudiced or motivated by anything other than  
9 a desire to do his duty and to tell the truth as he under-  
10 stood it, because with every other witness, every other one  
11 somebody could say well, he is hired by that side or hired  
12 by the other side or he is a friend of somebody or something  
13 like this. It is except for one man. That happens to be  
14 Dr. Di Maio.

15 Who is Dr. Di Maio? He doesn't know any of the  
16 parties in this lawsuit. He had nothing to do with them.  
17 He is the county medical examiner for the City of New York.  
18 What is his job? His job is to perform autopsies where  
19 there is a death involved, an accidental death; to perform  
20 autopsies, come to certain findings and to see whether or  
21 not his findings are compatible with the history given  
22 explaining the accident. For example, if he should do  
23 an autopsy on a person who is supposed to have died by  
24 drowning and he finds poison in the system there would  
25 be an incompatibility. He is looking to see whether the

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2 autopsy findings square with the history given. Okay. I  
3 don't think that any lawyer in this case can say that Dr.  
4 Di Maio had any interest when he testified in telling you  
5 anything but the truth, and bear in mind that what Dr. Di  
6 Maio did in this case was done within days after the ac-  
7 cident, no lawyers were involved for anybody; there was  
8 no lawsuit at the time; nobody spoke to him. The man just  
9 did his job. He did the duties that he is supposed to do  
10 as the medical examiner for the City of New York.

11 I think if we start with the basic physical find-  
12 ings made by Dr. Di Maio, I think we have a solid foundation,  
13 a good cornerstone, if you will, on which we can see how  
14 things grow and develop.

15 Dr. Di Maio testified that the only evidence  
16 of injury to Mr. Iannuzzi was a skull fracture on the top  
17 of the head. Not the back, but the top. The site of the  
18 fracture was the top of the head and it seemed to spread  
19 over to the right side. He testified that that type of  
20 injury would be compatible with a history of a man being  
21 killed because a piece of lumber was dropped down on him  
22 striking him on the head -- on the top of the head.

23 Now, he testified in answer to one of Mr. Lory's  
24 questions "Could you get the same kind of fracture on the  
25 top of your head if you fell into the hatch and landed on

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2 the top of your head?" He said "Yes." However, he further  
3 testified that if Mr. Iannuzzi had been hit by a car, a  
4 heavy car on a downward swing, as Mr. Lory has been claiming  
5 to you happened -- hit by a heavy car on a downward swing  
6 anywhere about the back of the head or the body, he, as a  
7 forensic pathologist, a man of many years' experience in  
8 handling these kind of accident cases and looking for clues,  
9 he would expect to find some mark on the body -- a black  
10 and blue mark, a bruise, a contusion, laceration, a fractured  
11 rib or something if you are hit by a heavy car. Nothing.  
12 The body was clean. There was no injury at all except on  
13 the very top of the head, and if a man is standing or walking  
14 about in the upper tween deck, it is the top of his head  
15 that's exposed to any falling piece of wood. That's exactly  
16 where it would hit him.

17 I will give you something else to think about.

18 The height of the hatch was approximately 20 feet from one  
19 deck level to the other, I think it was said, and there was  
20 a four-foot coaming. A man falling, if he fell, that stands,  
21 even if he landed on the top of his head, he was found to  
22 be in an outstretched position, should have some other  
23 sign of injury some place else; some other mark, a busted  
24 rib, a bleeding nose, marks about the face, the arm, some-  
25 where. Can you fall that kind of a distance just landing

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2 freakishly on the top of your head -- with outstretched  
3 hands you might break some fingers. How can it be? Does  
4 it make sense from just the physical facts of what was  
5 found on the autopsy? Does this story makes sense just  
6 from that? I don't think it does. They have the burden of  
7 proving their claim by a preponderance of the credible --  
8 and that means believable evidence. They have got here a  
9 preponderance of incredible evidence, there is no doubt  
10 about that, because they have more witnesses, but I submit  
11 to you that what their witnesses say is not credible. From  
12 a completely unbiased, disinterested person we see from the  
13 very beginning that the sort of story that Mr. Lory has been  
14 giving to you, presenting to you just can't be supported,  
15 because if Mr. Iannuzzi were hit by the car and were pre-  
16 cipitated down a distance of 20-odd feet, you are going to  
17 find other bruises, other marks on his body, but if he was  
18 standing there and was just struck right on the top of the  
19 head by a falling piece of lumber that Mr. Andre threw down,  
20 that's the only injury you would find and that's the only  
21 injury that appeared.

22 Well, we don't have to limit ourselves solely to  
23 the autopsy, although I think that that pretty much in  
24 and of itself should cover things, and I want you to note  
25 here that in this autopsy report, an official record of the

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2 city, at the very end "cause of death," and the very last  
3 sentence says "Struck overhead by lumber while on deck  
4 of ship 11/24/68." That is the way this accident happened  
5 as it was given to Dr. Di Maio.

6 Now, Dr. Di Maio wasn't aboard the ship any more  
7 than you were or I was, but this is the history he got.  
8 Where did he get it from? Let's just trace this down to  
9 its source. Here is Exhibit BB, and it says right at the  
10 top "This is a New York City government record and should  
11 be accurately completed." It is an official record of the  
12 government. We don't make it up, nor does anybody else  
13 in this lawsuit. It is from the Prospect Heights Division  
14 of Long Island College Hospital to the Chief Medical  
15 Examiner of the City of New York.

16 "Statement and particulars of the death of Mario  
17 Iannuzzi." The whole thing is in evidence. I am not going  
18 to spend too much time in my summation reading all of this,  
19 but you are free to take this and any other exhibits into  
20 the jury room and read them all, but what I want to point  
21 out to you at the moment is here is a section that the  
22 hospital must fill out in answer to this printed part of  
23 the form. It says "Injuries said to have been received:  
24 state when, where, how, by what means, persons received  
25 and falls, the distance and location of the fall and burns and

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scald"and so forth and ends up "And always give such information as will lead to the accurate knowledge of the case and facilitate judicial inquiry and justice."

This is what the hospital filled in in this report that they give to the medical examine. "PT", which I think we will all agree stands for patient. "Was apparently walking on deck of ship at about 7:15 P.M., 11/24/68 when a load of lumber hit him in the back of his head."

We get again falling lumber hitting him in the back of his head. By the way, this is signed by a Dr. Weinstein, if I can read his signature correctly, house surgeon at the hospital. Now, Dr. Weinstein and the Long Island College Hospital, they have no reason to falsify or to mislead anybody, or to say something that is not the case as best as they know it. They are disinterested, too. They are filling out on November 29th a form that they must fill out to give to the medical examiner's office. They don't give a hoot about this lawsuit because there is no lawsuit. They are doing their job, and they are not out to mislead or deceive anybody.

By the same token Dr. Weinstein and the hospital was not present when the accident happened, so that obviously they are getting their information from somewhere. Where is the source of their information? Three witnesses

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1 testified for Mr. Iannuzzi, and they were all friends of  
2 his from the old country. Not a single one of them went to  
3 the hospital with him. I asked each one "Did you go to the  
4 hospital?" No. "Who went to the hospital? One man that  
5 we know of. Mr. Andre went to the hospital." You remember  
6 why he went to the hospital. Mr. Andre, who testified here  
7 just yesterday, told you that there he was dropping lumber  
8 down into the hatch -- he is over the coaming, he is looking  
9 down, he sees what is down below and he is dropping it down  
10 and the lumber he dropped hit this man, whose name he didn't  
11 know at the moment, but he went to the hospital and at the  
12 hospital he found out that the man was identified as Mr.  
13 Iannuzzi.  
14

15 Mr. Andre told you that he reported to some person  
16 aboard the ship, some ship's personnel, I think it was the  
17 boatswain; he reported to the boatswain, and he reported  
18 or confessed to the policeman investigating the accident  
19 that he had dropped this wood onto this man whose name he  
20 didn't know at the time, but it was Mr. Iannuzzi. There was  
21 only one accident that night, so there shouldn't be any  
22 confusion about that. He also said to you that one of  
23 the reasons that he went to the hospital was to explain  
24 to the doctors how the accident had happened so they might  
25 know how to treat the man. So now we know where the hospital

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gets its information from, and you can see how something that started immediately after this accident has just in the natural course, untouched by any lawyer, just developed itself on official governmental documents and it all comes from the man who, I submit to you, was in the best position to know exactly what happened, to know exactly what he did, and he finally did come to court to tell you what he did and what had happened.

Mr. Andre went to the hospital because in his own words he felt responsible for the accident. He wanted to give blood if he could. He wanted to help in any way that he could and it is certainly understandable. I don't think -- I just don't think, and you use your own common sense about this -- that a man would, right after an accident, where he is dropping lumber down and he is in a perfect position to see what is happening would go about saying to policemen, saying to ship's personnel and saying to hospital personnel that "I dropped wood on this guy's head and I feel responsible and I want to help. Can I give blood? Can I do something? I don't think a man would do that unless it happened that way. It is incredible. Why should Andre make this kind of a confession? Why should he come to court and tell you about this unless it happened that way? It is incredible, but the man was upset. He

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2 been doing, the work that was going on; that he was there  
3 dropping this wood down and that he reported to the  
4 ship's personnel and he confessed to a police officer that  
5 he had dropped wood on Mr. Iannuzzi's head, but he didn't know  
6 his name at the time and he went to the hospital as I said.  
7 That was the substance of his testimony on direct examina-  
8 tion. Then lo and behold Mr. Lory stands up to cross-  
9 examine him and Mr. Lory says to him, as I recall it, be-  
10 cause I objected to the question, "Didn't you report that  
11 the wood was knocked out of your hands?" I objected because,  
12 you see, that's what I would consider a leading question.  
13 The lawyer is suggesting the answer.

14 MR. LORY:: Objection, your Honor. That would be  
15 cross-examination. I would be entitled to lead.

16 THE COURT: I permitted the answer.

17 MR. COHEN: I know you did, and the jury heard it  
18 and it is in the record and I am talking about it.

19 THE COURT: All right, go ahead.

20 MR. COHEN: Now that Mr. Lory has, in the form  
21 of his question, said to him "Didn't you report that it  
22 was knocked out of your hand". Mr. Andre follows the cue  
23 and says "Yes." That's not what he had told us, however,  
24 the afternoon before when we examined him outside your  
25 presence, and I confronted him then with the testimony he

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2 didn't mean to kill anybody. He didn't mean to hurt  
3 anybody, but he is a young guy. I think he was a little  
4 careless. You know "We always work under the plane of the  
5 falls." Everybody else said it is bad and dangerous, and  
6 without even understanding maritime work, with your never  
7 having worked aboard a ship, I think you can understand  
8 why it is dangerous for anybody to position themselves  
9 under the path of a draft when good winchmanship calls  
10 for a draft to come in so that it clears the coaming by  
11 only a couple of feet and you have got a coaming that is  
12 four feet two inches high, so if the operator is doing a  
13 good job he tries to bring it in so that it is six feet  
14 above the deck and Mr. Andre himself is six feet tall,  
15 so that if he stands up straight he is going to stand right  
16 in the position where he can get smacked by anything that  
17 is being loaded. You know, if he is bent over and he has got  
18 a piece of wood above his head, what he is doing is when he  
19 raises it to throw it down, he would be putting it -- if it  
20 was struck by anything, and we will get to that in a minute,  
21 but he would be putting it right in the path of something  
22 that is being swung in, moving in.

23 Now, Mr. Andre testified yesterday morning -- Wednes-  
24 day on direct examination by me and he told you what he was  
25 doing aboard the ship and we just developed what he had

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2 gave the day before, which would be Tuesday afternoon,  
3 and it certainly wasn't something that he said to you  
4 Wednesday morning when I was interrogating him first. So  
5 after Mr. Lory finished I asked a few more questions to  
6 find out how come it is we now have a little bit of a switch-  
7 eroo, a change in the story, and it turns out that this man  
8 who came to court because I subpoenaed him and because I had  
9 his Honor give him continuing instructions to keep coming  
10 back day after day because I wanted him here as a witness  
11 so that you could get all the facts, this man after testify-  
12 ing Tuesday afternoon outside your presence goes to Mr.  
13 Lory's office and then comes in Wednesday and when Mr. Lory  
14 asked him questions we have a little bit of a variation  
15 of his testimony. Now, why does he go to Mr. Lory's office  
16 in the middle of this trial? Mr. Lory didn't ask him  
17 to come to court. In fact, Mr. Lory at no time in his  
18 presentation of this case to you -- at no time did he  
19 tell you that there was a carpenter there or that Mr.  
20 Iannuzzi was struck by lumber or that carpenters were in-  
21 volved or that Mr. Andrew had said he was involved. At no  
22 time. In fact, Mr. Lory produced witnesses here to testify  
23 to you that there were no carpenters there. Do you remember  
24 Garofalo? You know, there is a system. Things go on in the  
25 waterfront a certain way. When you load cars they have got to

1  
2 be checked and everybody who works there -- and you heard  
3 it from the experts -- the carpenters work along with long-  
4 shoremen. The longshoremen were taking it in and the car-  
5 penters were chocking it. So I asked Mr. Garofalo, the hatch  
6 boss "Were there any carpenters there? No. No," he  
7 said, "they had left long ago."

8 We asked Mr. Scotto, the gangway man who was on  
9 the deck. These were Mr. Lory's witnesses. He brought these  
10 people into court to tell you this. Mr. Scotto -- he is  
11 supposed to be on the deck watching things, seeing things.  
12 "Did you see any carpenters? Oh, no, I didn't see any  
13 carpenter."

14 The only one who would admit there was a carpenter  
15 was Mr. Coppola, and he said the carpenter was at the corner,  
16 the forward in-shore corner right about over here, and I  
17 think we have it marked in red on this model, and that would  
18 be a safe place for a person to be. But did he see any  
19 carpenter in the middle of the hatch there? "No." "Did  
20 they know? Is this something new to them? Didn't Mr. Lory  
21 have any knowledge that a carpenter named Andre was involved?  
22 These are not my records, these are city records. Anybody  
23 can get them. You go down to the medical examiner's office,  
24 you ask for a copy of the autopsy report and you get it and  
25 you get this other paper from the hospital, too. You can get

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1 the hospital records if you want. You can go to the Police  
2 Department and get the accident reports if you want. You  
3 can do all these things. Did he just goof? No, he didn't  
4 just goof. On February 14th, Valentine's day of this year,  
5 some months before this case has started, he arranges a  
6 meeting with Andrew. Now, how did he know about Andre's  
7 existence if he didn't know that Andre was involved in this  
8 lawsuit? I mean, you don't suddenly on Valentine's day  
9 look in the phone book and call up a stranger named Andrew  
10 and say "Hey, meet me at Wetsons." They are meeting for  
11 some reasons. He knew why he wanted to meet Andrew. He  
12 knew why, because it related to this case. Did he at any  
13 time mention to you in his opening that this was involved?  
14 Did he say anything to you about it? What kind of a cover up  
15 is going on here in this lawsuit? Why don't they come out  
16 and tell you all the facts? These are documented official  
17 records. There is no hanky panky. There is no mystery, except  
18 the only mystery is why didn't he want to tell you. It is  
19 because it doesn't fit in with his theory of the case. He  
20 wants to sue this ship owner. He wants you to believe it was  
21 caused by some bad winch. Obviously Andre's confession shows  
22 that the winch had nothing at all to do with this case. In  
23 fact Andre's confession even shows that Mr. Iannuzzi wasn't  
24 at fault in this case, and he wasn't. He is on the upper  
25

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2 tween deck. He is an experienced hatch boss. He was so  
3 experienced that my client thought that he is competent  
4 enough to work as an acting foreman.

5 Now, he is not a young kid. He is a serious,  
6 responsible man. He has got a family, and you can look  
7 at his children and you can tell from a person's children  
8 the kind of people they are. He is not a wiseguy or a  
9 young kid like somebody else who came to this courtroom and  
10 he is not going to put himself in the most dangerous position  
11 for no reason at all where any man could stand. Mr. Garofalo  
12 would have you believe that for 15 minutes or so he is standing  
13 there doing nothing, but standing in the most dangerous  
14 position that anybody could stand on this deck. For what  
15 reason? Why would he do it? He didn't do it because he  
16 wasn't there. Where was he? He was down below minding  
17 his own business. He has got longshoremen working down  
18 below in the upper tween deck. He wasn't at fault for this  
19 accident. He was killed by Andre, and you can't get away  
20 from it. He is minding his own business down on the upper  
21 tween deck where he should be with these longshoremen and  
22 this kid comes along and just drops wood down and that is  
23 how this accident happened.

24 Who did they come into court with against all that?  
25 What do they come into court with? They come into court with

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2 a guy named Coppola, if you can believe him. He is standing  
3 right over here (indicating) in the middle of the hatch,  
4 about 20 feet away. Do you see where the judge is? I don't  
5 know, where would 20 feet away be; here? Maybe a little  
6 less. All right? What is Mr. Coppola's job, he has got to  
7 watch the draft come across because as you operate the  
8 winches there aren't any clicks or notches, so you operate it  
9 the way you drive a car. You look at the road and you  
10 control your steering wheel. You look at your draft and  
11 you move your winch levers, so he has got to be watching  
12 the draft. Did he see Mr. Iannuzzi on the main deck? No.  
13 He didn't see him. Did he see anything hit Mr. Iannuzzi?  
14 No, he didn't see him. How could it be? It was because  
15 Mr. Iannuzzi wasn't on the main deck. He couldn't have  
16 been on the main deck. He couldn't have been on the main  
17 deck. He couldn't have received the kind of injuries that  
18 were found on autopsy, except by his being down on the  
19 upper tween deck and being hit by a piece of lumber being  
20 thrown down from overhead. That's the way this accident  
21 happened. There were a lot of experts that came in to talk  
22 to you about hydraulics. You know, Mr. Lory said in his  
23 opening this is like a little red fire engine. It is really  
24 like a merry go round, I think, that you have been led on  
25 for the last two weeks. Nobody said to you there have been

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1  
2 carpenters, but you have been given a real merry go round  
3 tour about hydraulics and hydraulic fluid and bubbles of  
4 air and slugs of air. None of it really fits together, does  
5 it, because even Mr. Ferenczy says if you have air in the  
6 winch, how does it affect it? He admits it makes it  
7 sluggish. It doesn't react fast, it reacts slow. That's  
8 what sluggish means. That is not the way they described  
9 this accident to you. They don't say that the winches  
10 were reacting slowly. Their story is that the winches,  
11 when Mr. Coppola started the winch the winch ran away out  
12 of control.

13           Now, my goodness, how can they do it both ways?  
14 How can he say that there had to be air in the winch when  
15 his own expert said that air in the winch would make it  
16 react sluggishly, and he puts on a winch man to say that is  
17 not what happened, he said it ran away. It didn't do  
18 either. It reacted well. The winch had nothing to do with  
19 this case, but he has got Mr. Andre answering his question  
20 "Didn't you tell somebody that it was knocked out of your  
21 hand?" "I don't know how it could be. Just picture this  
22 yourself. Visualize it and use your own common sense  
23 again. You have got a length -- several lengths of lumber  
24 in your hands and you are bending over the coaming and you  
25 are going to drop it down. How does it get knocked out of

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1  
2 your hands? When he first showed us how he was holding  
3 it further, he had his hands at the top of the wood together  
4 to throw down and when I pointed out to him that in such a  
5 position, with his back to the rail and back to the draft,  
6 how could anything possibly hit him, he now tells us --  
7 he changed, I thought -- that he wasn't holding it at the  
8 top, he now got his hands somewhere in between like this  
9 and maybe some of it was over his head. I really don't  
10 think it is too important. I really don't.

11           You work this one out. I don't think it is im-  
12 portant because if he just didn't throw it down and kill  
13 Mr. Iannuzzi that way, he was just careless in sticking it  
14 up in the air so that it would be knocked out of his hands  
15 by any draft that was moving across. I said to him "Did  
16 you check to see if anything was moving across before you  
17 positioned yourself there to do this work?" I said it  
18 to him several times and I thought I got a very peculiar  
19 fuzzy kind of answer about that he has ESP or a 6th sense,  
20 but one thing he wouldn't say was he took the time to look  
21 with his eyes to see if anything was coming. You could  
22 picture what was happening. This was the last piece of work  
23 for the night. He had gone over to the number 4 hatch  
24 and picked up some wood and without looking or caring or  
25 thinking because it is now the end of a long day he just

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2 walked over there and stood in the worst possible spot  
3 you could stand and threw it down or put it up so it would  
4 be knocked out of his hands. It doesn't make any difference  
5 which way it really happened as far as this case is con-  
6 cerned, because it was his fault and it has nothing at all  
7 to do with the winches. We have a lot of fancy talk --  
8 I don't mean fancy, that is the wrong word and I withdraw  
9 it. We have had a lot of theoretical talk -- that's a better  
10 word -- about hydraulic winches, what happens and all the  
11 rest. You know what it really all comes down to? It  
12 proves to me once again how incredible this story that Mr.  
13 Lory wants to get you to believe is. It proves to me that  
14 they have all agreed that the most ~~that~~ that draft could  
15 travel if that Burton winch were completely out of control  
16 would be six feet a second and this deck area was about 25  
17 feet wide from the rail to the coaming.

18 Even if you forget about the effect that the up  
19 and down winch was having on the draft, which would slow  
20 down its traverse across, it would take about -- at least  
21 six feet a second, it would take about four seconds' time,  
22 at the fastest, to go from the rail to the coaming. You know,  
23 if the winch operator did nothing more than to take his  
24 hands off the winch -- just to do that, that handle would  
25 go back into neutral and in one second's time everything

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2 would stop. That's all he had to do. Right? Mr.  
3 Coppola says he didn't take his hands off, he said he  
4 brought it back. That would make it even less time. In  
5 other words, what we are saying is that there was ample  
6 time for anybody to stop this system that had a fail-safe  
7 system like the deadman's brake on a locomotive. There was  
8 a fail-safe system in it. Mr. Ferenczy didn't say there  
9 was anything wrong with the fail-safe system. Nobody did.  
10 Let's use common sense for something else, this claim that  
11 there was a bad winch that runs away when you start to  
12 slacken off. You know, they didn't load that car that was  
13 on the cargo hook at the time. They brought it back down  
14 to the dock and when they lower it -- when they had to lower  
15 that car down onto the dock they had to slacken off with  
16 that same Burton winch.

17 Now, you know there are other people working on  
18 the dock to receive this car. Do you think, using your  
19 common sense, that if Mr. Coppola was in truth operating  
20 a winch that he couldn't control, because when you try to  
21 slacken it off it runs wild -- do you think that he would  
22 use that same winch to bring that same heavy car down on the  
23 dock and run the risk of other people getting hurt? Is that  
24 common sense? If you are driving an automobile and your  
25 brakes don't work, do you continue driving it or do you

1 bring it into a service station or better yet, stop it  
2 and bring somebody over to find out what's wrong. Imagine,  
3 they want you to believe that they would use -- and this is  
4 their own group of men. They work together as a group,  
5 as a gang over the years. They all knew each other. They  
6 want you to believe that they would let a winch that is  
7 uncontrollable when you slacken off -- that they would use  
8 that same winch to bring that car back down on the dock  
9 and they have to slack off to bring the car back down --  
10 they would let it be used then, too. Incredible. Incredible.  
11 This is a put on. And the put on continues. It continues.  
12 Not only do they use that winch for the car, but now they  
13 have got a very badly injured man down there and they have  
14 got to take him out of the hatch and get him to a hospital  
15 and get him some medical attention.

17 Now, you know, you don't have to lift a man out  
18 by winches. That's not the way people go in and out. There  
19 are ladders and passageways -- there is a gangway at the  
20 dock, right? They used the same set of gear. Again, it is  
21 a question of just common sense. If you are going to believe  
22 that this gear was not fit; that it couldn't be controlled;  
23 that it is running wild, how can they use it to bring a badly  
24 injured man up out of the ship and put him on the dock so  
25 he can get some medical treatment? How? It is just

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2 incredible. The answer really is there is nothing wrong  
3 with that gear, and they knew it, and this case wasn't  
4 presented fairly. You didn't get the full facts. Now, you  
5 know, you have got an obligation here. You are not beholden  
6 to anyone. You are all free spirits and we chose you that  
7 way. If you knew any of us you would be contaminated and  
8 somebody would say you shouldn't be sitting because it  
9 wouldn't be fair. You sit here because in the considered  
10 judgment of all of us you are independent people, you have  
11 no axes to grind, you have taken an oath of office and  
12 you have got the most important function in this courtroom,  
13 bar none, and you want to do your oath. We have a different  
14 job. Our job is to present the proof to you so that you  
15 can do your job properly.

16 Now, we bring in whatever proof we know exists  
17 and let you decide how it fits together. We bring it to  
18 you and you decide. That's how it should function. But we  
19 should bring everything. We shouldn't bring you one side of  
20 a case when we know of others. We shouldn't hide from you  
21 the fact that we met with an Andre and knew that he was  
22 involved in this lawsuit and we met with him and knew about  
23 his involvement before this case went to trial and not  
24 even mention it to you; sweep him under the rug; take the  
25 killer out of the case; don't let the jury know about it.

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That's the way they have done it. I don't want to carry on, but I have been. I get emotionally involved about these things but let me conclude this way.

Look, over the ages mankind has tried to develop a system for resolving disputes, and really that's what you have got here, a factual dispute. It wasn't too long ago in man's history that people were resolving disputes in very peculiar ways. They had trial by combat. Each side would hire a knight or a champion and they would rush at each other with lances and battle and the stronger guy would win. That doesn't tell you where the truth is. They developed another system back in merry old England, trial by ordeal. How do you tell if a witness is telling the truth? You put his hand in some boiling oil and if he doesn't scream -- if he doesn't scream in pain he is telling the truth. My God, that was such a horrible system you were afraid to sue anybody because you had to put your hand in boiling oil. Okay, so we have progressed. Civilized man has progressed and I think we progressed to the point where to my personal knowledge we have reached the finest system of resolving disputes, and that is this system, the jury system. You take people from the community and you present everything to them. Present it all and let them decide what the facts are. And what are they looking for? They are looking for the

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1 truth. You know, if you see the truth and you don't follow  
2 it in your verdict it is all for nothing. It is all for  
3 nothing. We don't have to have a progression of civilization.  
4 We don't have to have a courthouse. We don't have to have  
5 the judge. We don't need lawyers and we don't need witnesses,  
6 the whole thing is wasted. It is meaningless unless you  
7 folks do your job, do your duty, and really what it comes  
8 down to is follow the truth. That's what you have got todo. As  
9 I view this, the truth here is so clear, so shiny, so  
10 brilliant, I think it just has to be obvious and I think  
11 you must, according to your oath, because we all rely on  
12 you to do this, you must follow that truth in giving your  
13 verdict. Thank you.

14  
15 THE COURT: Mr. Kain.

16 MR. KAIN: May it please the Court, Mr. Foreman,  
17 ladies and gentlemen of the jury:

18 Mr. Cohen has, I think, very aptly described to  
19 you just what the function is you served and I think he has  
20 ably argued to you what he believes to be the truth in this  
21 case.

22 As the ship owner's attorney I must tell you that  
23 I believe Mr. Cohen's analysis of this case is quite accurate.  
24 I believe the more persuasive arguments and the facts--  
25 the undisputed facts indicate that this accident occurred

1 in the manner indicated by Mr. Cohen. However, because  
2 the plaintiff in this case has seen fit to allege an  
3 entirely different cause of action and to base the claim on  
4 an entirely different set of alleged facts, I am in the  
5 awkward position of having to go forward and tell you what  
6 I think disproves the claim alleged by plaintiff, because  
7 it is my expectation that if you believe, as Mr. Cohen  
8 does and as I do, that Mr. Andre caused this accident, then  
9 I fully anticipate that his Honor will charge you that the  
10 plaintiff in this case has failed to meet her burden of proof  
11 and that you must return a verdict in favor of the ship  
12 owner.  
13

14 With that as a preamble, let me talk to you about  
15 something else. Mr. Cohen mentioned to you the autopsy  
16 report made before there was any thought of any lawsuits,  
17 made before there were any lawyers involved, made within  
18 days after the accident. I would like to call your attention  
19 to another document. I suppose in a sense we could call  
20 these -- you can witness this. This is the cargo stowage  
21 plan, which incidentally I placed on the table upside down,  
22 but you heard from these witnesses -- for example, let's  
23 take Mr. Garofalo, the hatch boss. Now, Mr. Garofalo told  
24 you that immediately before this accident he talked for  
25 some incredible period of time, I think it was something

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2 like 10 or 13 or 15 minutes with Mr. Iannuzzi and this  
3 conversation, according to Mr. Garofalo, was prompted by  
4 an inquiry to Mr. Iannuzzi, "Do we have room for one more  
5 car?" This apparently required an inspection of the hatch,  
6 the area they were working, the upper tween deck by Mr.  
7 Garofalo to decide can you put another car in here. I  
8 submit to you, look at this upper tween deck. Virtually  
9 half of this upper tween deck has nothing in it. It is a  
10 small matter, perhaps, but I think it says something about  
11 the credibility of the evidence given to you.

12 Does this require a 13-minute discussion? This was  
13 made contemporaneous with the loading of the ship. Certainly  
14 nobody, when this document was made up, had any reason, never  
15 mind to anticipate a lawsuit, but no reason to anticipate  
16 an accident. Then there was talk by Mr. Scotto. He couldn't  
17 move around; he had to duck. These witnesses all told you --  
18 as a matter of fact, Mr. Coppola came in and he drew for  
19 you here a stowage of drums on deck just about abreast of  
20 the hatch. You had Mr. Scotto talking about drums com-  
21 prising the deck cargo. Here again, it says something  
22 about the credibility of this witness. This stowage plan  
23 shows there was one solitary tractor located on that  
24 starboard side of the ship. Just one. This is made up, as  
25 I said, for anybody that has any cause to think about it,

2 before anyone had any reason to think about lawsuits.

3 Now let's just briefly touch on some of the things  
4 that Mr. Cohen didn't touch on, if I may, because there is  
5 one thing that impressed me about this that Mr. Cohen didn't  
6 really mention. When Mr. Andre was on the stand yesterday  
7 he told you, and as Mr. Cohen pointed out, that he hung  
8 over and he held the end of this board and he dropped it.  
9 As a matter of fact, I think his Honor asked the question  
10 of the witness and he pointed out that this was his in-  
11 variable practice. He also told you, as Mr. Cohen pointed  
12 out, that he told ship's personnel and he told this police  
13 officer that immediately after this accident occurred  
14 that he had dropped the lumber; that he had struck this  
15 man on the head -- this injured man on the head. Then in  
16 answer to Mr. Lory's questions he comes in and he says  
17 "Well, eventually I realized that the injured man was the  
18 man who was the ship's superintendent, the stevedore's  
19 superintendent. I didn't know his name, but I saw him  
20 around the ship. He didn't know his name, he saw him  
21 around the ship and eventually, when he found out who the  
22 injured man was, he knew that that wasn't the man that he  
23 dropped it on because he saw that man on deck. Now, let's  
24 just stop and think what he is saying here. He is now  
25 saying, and he is asking you to believe -- we had some talk

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2 about the plane of the falls. Mr. Iannuzzi was allegedly  
3 in the plane of the falls. Mr. Andre says "I was in the  
4 plane of the falls." Mr. Garofalo says "I was looking up  
5 talking to him and I saw this car come over and hit him  
6 in the back of the head." Mr. Garofalo didn't say stand-  
7 ing right next to him was the carpenter passing down lumber.  
8 He said there weren't any carpenters working in that hatch  
9 at the time.

10 Let's go further. Does your common sense tell you  
11 that Mr. Iannuzzi and Mr. Andre can stand side by side so  
12 that the lumber knocks it out of Mr. Iannuzzi's hand-- I'm  
13 sorry, the car knocks it out of Mr. Iannuzzi's hand and  
14 simultaneously hits Mr. Iannuzzi and drops him into the  
15 hatch? Is that logical? It is side by side and yet when  
16 it happens Mr. Andre doesn't know that the man standing next  
17 to him has been hit with the car. How would he know that?  
18 They are standing right next to each other. So, as Mr. Cohen  
19 said to you, your common sense plays a part in this. Do  
20 you really believe that two men can stand side by side,  
21 one be hit by a car and the other one holding lumber over  
22 his head be hit with the same car -- have the lumber hit  
23 with the same car and be totally obvious to the presence  
24 of the man next to him? If you believe it, why didn't Mr.  
25 Garofalo see it?

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Again, Mr. Coppola. He didn't see anybody on that deck except one man passing lumber down 15 minutes he told you before this accident happened up in the corner where this red dot that he put on here is. The only other person that he saw on deck was Mr. Scotto he would have you believe. And yet here again, as Mr. Cohen aptly pointed out to you, when you drive a car you look ahead. Do you believe this man can Burton a car across, handling the delicately balanced control, which even the plaintiff's experts said they are very delicately balanced. They react much faster than an electric winch. Do you believe he could Burton this across and pass a car approximately six or seven feet above the rail -- you heard Mr. Andre talk about ESP. Perception. Longshoremen working on the waterfront, they are used to seeing these things out of the corner of their eye. Yet Mr. Coppola tells you "I didn't see anybody on deck. I didn't see the car hit anybody."

Well, I submit to you that part of it is true. He didn't see the car hit anybody because the car didn't hit anybody. But do you really believe he could watch it go across -- and then we have his friend, Mr. Scotto standing over here. They are all members of the same gang. What does Mr. Scotto tell you? He didn't see any carpenters standing there right next to Mr. Iannuzzi. When he came into this

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1 courthouse and took an oath and testified at a pre-trial  
2 deposition he conceded at that time that he hadn't seen  
3 Mr. Iannuzzi struck by a car. He was asked if he gave that  
4 statement. He didn't remember giving that statement.  
5 It was conceded that this statement was taken. It was  
6 taken before a Certified Shorthand Reporter, just like you  
7 have here. There is no reason, certainly, for the reporter  
8 to take down something that wasn't true. You heard it  
9 read to you. Why didn't Mr. Scotto see any of these things?  
10 Well, he says he had to duck down behind these drums, he  
11 couldn't move around. That's why he had ahold of the tagline,  
12 he couldn't move around. What drums? There aren't any drums  
13 on the deck.  
14

15 They may all be small things, but Mr. Lory pointed  
16 these things out to you when he said to put the jigsaw  
17 puzzle together, it is like a little red wagon. Let's put  
18 it together on the basis of what they tell you. Nobody  
19 saw anybody working here. As Mr. Cohen pointed out to you,  
20 is it possible that you can have carpenters working in  
21 a hatch? You heard Captain Wheeler testify and you heard  
22 Mr. Andre say you don't take a ship out without securing it.  
23 Obviously this was the last car. He testified to that.  
24 Why wouldn't there be carpenters in the hatch? They already  
25 loaded a couple of cars. They were already shoring. If they

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2 weren't in the hatch, why was Mr. Andrew throwing lumber  
3 down? Who was he throwing it to? Do you really believe  
4 Mr. Garofalo the hatch boss can stand there for 10, 12,  
5 13, 15 minutes, talk to Mr. Iannuzzi, talk to him and never  
6 notice anybody throwing lumber in the hatch? I submit to you  
7 it is an incredible story, but then let's take a little  
8 more of what we are talking about here.

9 Let's take Mr. Coppola's last statement as to  
10 what he did when this draft allegedly ran away from him.  
11 He told you that he picked this draft up on the Burton boom,  
12 and as you can see, if he picked it up from the dock he has  
13 to pick it up directly under the head of this boom. He  
14 picks it up he told you and when he got it at a sufficient  
15 height he said he very, very carefully, because he is a  
16 careful man, he very carefully cracked the valve to slack off  
17 on this Burton and simultaneously he very carefully took  
18 a strain on his up and down in order to move this across  
19 on this plane.

20 Now, he would have you believe he did nothing  
21 thereafter but stand there taking this very carefully  
22 across, one cracked slowly and then the other cracked  
23 slowly and suddenly for no reason whatsoever this swooped  
24 down. He didn't see it strike anybody, but it swooped down.  
25 He immediately put it in neutral. The plaintiff's expert,

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1 Mr. Ferenczy, conceded that when you put this in neutral  
2 it would stop it, air slug notwithstanding. But he gave you  
3 some explanation about what Mr. Coppola said he didn't do.  
4 Mr. Coppola said he immediately put it in neutral. Mr.  
5 Ferenczy said his reflexes aren't that fast. Does your  
6 common sense tell you that Mr. Ferenczy could have any  
7 knowledge of just how fast Mr. Coppola's reflexes were?  
8 Then both experts, both Mr. Napolitano and Mr. Ferenczy  
9 conceded, as Mr. Cohen pointed out to you, that it would  
10 take not a free spooling device, if you drove this thing--  
11 you didn't have to drive it because it is not like a reel  
12 for a fishing rod. You don't take the drag off it and  
13 just let it fall. It is driven. The drum has to rotate  
14 this way and they both conceded this was so. Both experts  
15 told you 110 meters per minute is the absolute fastest if  
16 you drove it straight down at full speed without any other--  
17 no influence from this up and down. The fastest you could  
18 take it would be six feet per second.

19  
20 Do you believe -- does your common sense tell you --  
21 just taking, if you will, the approximately four seconds,  
22 forgetting the influence of the other one. Does it take a  
23 man four seconds to move a control lever which he says he  
24 just barely cracked back to neutral? Does it take you four'  
25 seconds to react when you are driving your car to put the

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2       brake on? I submit to you it does not. And it becomes  
3       more incredible when you think about the influence which --  
4       both men incidentally said if Mr. Coppola did what he said  
5       he did and raised this to full hoist immediately, this would  
6       move the three feet per second at full hoist.

7               Now, Mr. Ferenczy would have you believe, and  
8       Mr. Coppola so testified, not just that the Burton winch  
9       was defective. He told you that "I put it to full hoist  
10      and nothing happened." Yet the undisputed testimony  
11      in this case is that these two systems in the master system  
12      and remote system -- there is no interconnection. There is  
13      no connection or piping or anything between the one for  
14      the up and down system and the one for the Burton system.  
15      What a coincidence that both should simultaneously fail,  
16      cause this accident and then for some reason unknown to  
17      anybody it repairs itself. As Mr. Cohen pointed out to you,  
18      look at all the things they did. They put the car back,  
19      they brought it back up with a stretcher, they put it down,  
20      they took this injured man out, and if you will remember  
21      at least one longshoreman, according to Mr. Coppola, came  
22      out with him. Is this logical to assume that you not only  
23      do this to a badly injured man, but that you would be  
24      foolhardy enough to ride out yourself, when as Mr. Cohen  
25      pointed out to you it is not necessary.

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1  
2 Let's go further. We took the testimony of the  
3 ship's boatswain. Now, he wasn't here, but he is a sea-  
4 faring man. His Honor will charge you of the effect of  
5 depositions. He testified and he was cross-examined. It was  
6 read to you. He said "Immediately after the longshoreman  
7 got through, after they took the injured man off I secured  
8 this hatch and in order to secure the hatch I had to close  
9 the McGregor hatch covers. What did you use? I use, the  
10 winch. I had no problem. I put the booms in their cradle.  
11 You can't go to sea with them like that."

12 What did he use? He used the same winches.  
13 He had no difficulty. He had no problems. You heard the  
14 third mate's testimony that he locked those pump rooms; that  
15 he had instructions which were carried out, and incidentally  
16 the chief engineer testified to the same thing. Those winches  
17 weren't touched until they got to Capetown, and the third  
18 mate told you he was present, he saw them tested with a  
19 spring balance. He saw how it was done and they worked  
20 without any problems whatsoever. No repairs were made to  
21 them and they were used without difficulty thereafter.

22 You heard the testimony of the vessel's chief  
23 engineer that he joined this ship in the building yard and  
24 that except for maintenance he did no work with these  
25 winches, he made no repairs to them; that they were virtually

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1 trouble free. This is all a coincidence. It is not just  
2 according to plaintiff's witnesses -- not just one, but two  
3 separate systems simultaneously fail and thereafter for  
4 some unexplained reason they caused no trouble. The people  
5 who were on board and operated these winches, Mr. Napolitano  
6 and Captain Wheeler told you the handles were spring loaded.  
7 The chief engineer said they were always spring loaded. I  
8 mentioned this because you might feel they put springs on  
9 after the accident and Captain Wheeler and Mr. Napolitano,  
10 they found them but they weren't there at the time of the  
11 accident, but I read you the chief engineer's testimony  
12 and they were spring loaded.  
13

14 He told you they were from the very beginning.  
15 Mr. Ferenczy said they weren't, but Mr. Ferenczy conceded  
16 that he was never aboard the ship. Now, that leaves me  
17 with just one further thing that I should bring out to you,  
18 and it puts me in a rather awkward position. I have told  
19 you that I believe that Mr. Cohen's contention is the ac-  
20 curate one; that the uncontested facts indicate that this  
21 is actually how this accident happened, and yet as Mr.  
22 Cohen pointed out to you in his and as I am sure his Honor  
23 will point out to you and possibly other attorneys, you  
24 are the triers of the fact, so what I say or what Mr. Cohen  
25 says or what anybody else says doesn't remove from you your

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2 prerogative to decide what are the facts. Since this is  
3 your prerogative, and although I believe the accident  
4 did not occur because of any defect in the winches, I would  
5 point out to you that in meeting these allegations the  
6 ship owner necessarily says "If you believe this, if you  
7 exercise your prerogative to believe what I consider to be  
8 a totally implausible story, then on behalf of my client  
9 I say to you if you believe Mr. Iannuzzi did this, then Mr.  
10 Iannuzzi did something which is absolutely improper. It  
11 is conceded there is no other testimony in this case that  
12 would controvert the fact that if you stand in the plane  
13 of the falls it is improper.

14 Captain Wheeler told you it is an axiom on the  
15 waterfront. Everybody has conceded -- Mr. Garofalo says  
16 he shouldn't have been there. "He should know better.  
17 I didn't tell him because he was my boss." I say if you buy  
18 this story that he was standing there, then I submit to you  
19 that there is no other testimony in this case but that he  
20 was contributorily negligent in bringing about this accident;  
21 that it couldn't have happened if he hadn't been standing  
22 in the plane of the falls. It is your prerogative to  
23 decide was he standing in the plane of the falls, but I  
24 assert to you that if you find he was and that the accident  
25 occurred in the manner in which Mr. Lory contends on behalf

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2 of the plaintiff in this case, you must necessarily find  
3 that this man contributed to it; brought about his accident  
4 because he was standing there where he should not have been;  
5 where he concededly should not have been, and I submit to  
6 you there is no other testimony in this case -- nobody has  
7 come before you and said "That's all right to stand there."  
8 You had Mr. Andre say "Oh, well, longshoremen do all kinds  
9 of things. We take all kinds of chances."

10 But I ask you to listen to his Honor's charge  
11 as to what constitutes contributory negligence and I assert  
12 to you that if you buy the plaintiff's theory, you must  
13 necessarily find this to be so. But again, lest I vitiate  
14 my original statement to you, I submit to you that the only  
15 explanation that makes any sense to me on the basis of Dr.  
16 Di Maio's findings and Mr. Andre's statements to you -- the  
17 only consistent explanation; the only reasonable explanation  
18 that I submit you could find in this case is that Mr.  
19 Andre, unfortunately, dropped lumber on Mr. Iannuzzi while  
20 he was working down in the hatch.

21 Now, Mr. Cohen has already touched with you on  
22 the value of our jury system and why we have it and what it  
23 means.

24 In conclusion, may I just ask you to give the  
25 parties in this case -- and I mean all of the parties, not

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2 just the defendants -- to give the parties in this case on  
3 the oath you took as jurors the same consideration that  
4 you would like to have were you a party in the case. May  
5 I also make the observation that under the court rules, Mr.  
6 Cohen is finished now and he may not arise again and I am  
7 about to conclude and I may not arise again, so if you  
8 hear from Mr. Lory some argument, and you well may, which  
9 you think should be answered and you say to yourself "Why  
10 doesn't Mr. Cohen, why doesn't Mr. Kain, why doesn't somebody  
11 get up and argue the converse of this with Mr. Lory?"

12 I would just point out to you that under the court rules  
13 we are not permitted to do so, and as Mr. Cohen asked you  
14 to do, may I also join in asking you to do, use your own  
15 common sense. Use your own recollection of what the facts  
16 were as produced before you. Not what I said happened,  
17 not what Mr. Cohen says and not what Mr. Lory says. I at  
18 least am convinced that if you do this you must necessarily  
19 return a verdict for this defendant. Thank you.

20 MR. LORY: If your Honor please, Mr. Foreman,  
21 gentlemen:

22 At this point, since I am the last to address you,  
23 and predicated upon some of the things that you have heard,  
24 perhaps I rate, but I am not. I am not for one particular  
25 reason. The argument advanced by Mr. Cohen falls or stays in

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1  
2 your mind based upon one finding, and one finding alone:  
3 where was Mr. Iannuzzi? Before we advance to the theory  
4 that plaintiff has set forth, you must first determine  
5 where Mr. Iannuzzi was. If he was as Mr. Cohen places him  
6 in the tween deck then you will have no alternative but  
7 to find for the defendant. On the other hand, if he was,  
8 as every witness in this courtroom placed him on the main  
9 deck, then you must go further.

10 Now, I remind you that with respect to those  
11 who came to court and testified, each one of them placed  
12 Mr. Iannuzzi on the main deck. Nowhere else. He was  
13 there. Regardless of whatever else happened, they all placed  
14 him on the main deck. There is testimony here that there  
15 were carpenters in the hatch. There is testimony here that  
16 there were longshoremen in the hatch. You were also told  
17 as to the number of men that were in the hatch, excluding  
18 Mr. Garofalo who is the hatch boss. Mr. Garofalo and Scotto  
19 were deck men, they were on the deck. The same way I have  
20 the opportunity to call people in to testify, everyone else  
21 does. Was anyone brought here to give testimony placing  
22 Mr. Iannuzzi anywhere else except on the main deck? Now,  
23 you heard what Mr. Andre said -- and first, before I even  
24 get to my own argument, let me first say this. I think  
25 it incumbent upon me at this particular point to comment on

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2 what has been said already so possibly we can put things  
3 in perspective.

4 I call your attention to the vessel's log. Mr. Kain  
5 now sets forth that he agrees with Mr. Cohen. You have  
6 heard testimony that Mr. Matthee, the boatswain, spoke to  
7 Mr. Andre and Mr. Andre told him what he believed had hap-  
8 pened immediately following the accident. Yet the log reports,  
9 and if I can read from the log at the moment, which is  
10 Plaintiff's 1 in evidence. You can take this into the jury  
11 room. You don't have to rely upon my reading. It is right  
12 here."1915, injury to stevedore. While supervising the loading  
13 of vehicles into number 3 upper tween deck, stevedore  
14 Mario Iannuzzi was injured. He was taken ashore immediately  
15 and hospitalized no treatment being rendered by the ship.  
16 Accident was not witnessed by ship's staff and at time of  
17 sailing details of the accident could not be ascertained."

18 There is no testimony here that Mr. Matthee did not  
19 go with the vessel. He was supposed to. How can they say  
20 in an official document that they have no knowledge as  
21 to what happened? Now, let's go further with respect to  
22 what's been said here. Mr. Cohen has made certain sug-  
23 gestions with respect to the fact that Mr. Andrew, for  
24 whatever reason he may have had, came to my office just the  
25 other day and also the fact that I had met with Mr. Andre

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1 at Wetsons, a likely place to meet for chicancery, but  
2 regardless this is what has been suggested. This is a ham-  
3 burger joint. We went there to have a hamburger. In any  
4 event, I would have one express purpose in talking to  
5 Mr. Andrew. I want to find out what happened. Mr. Andrew  
6 has told you that he spoke to a police officer. I put a  
7 question to him, since this question has been raised "Did  
8 you tell the police officer that the lumber that you had in  
9 hand had been knocked from your hand?" He said "Yes."

11 But what you were not told is that for the days that Mr.  
12 Andre was here in that other room waiting to be called the  
13 police officer he spoke was also there. Now, if they wanted  
14 to dispute my suggestion as to the question that Mr. Andre  
15 had something knocked from his hand -- just as they used  
16 all these books, when someone said something that was  
17 contradicted, all they had to do was call the police officer  
18 in. What did the man tell you? Did he tell you at that  
19 particular time that lumber was knocked from his hand or  
20 did he tell you what is suggested I told him to say, which  
21 I categorically deny. I am an officer of this court and I  
22 know what my duty is.

23 MR. COHEN: Just a minute. Mr. Lory didn't take  
24 the stand and testify under oath and the categorical denial  
25 of his in the course of summation is legally improper.

1  
2 THE COURT: Yes.

3 MR. LORY: Again let's go back to the one particular  
4 point with respect to where Mr. Iannuzzi was. Mr. Garofalo  
5 told you in his own way, Mr. Scotto told you and Mr. Andre  
6 told you. Mr. Kain places him side by side -- Mr. Iannuzzi  
7 side by side with Andre. There is no such testimony in  
8 the record. Mr. Andre told you he was working mid hatch.  
9 The records shows and the testimony is to the effect that  
10 Mr. Iannuzzi was on this ladder that was abreast of the  
11 coaming talking to Mr. Garofalo. This is a four-foot coaming.  
12 You have pictures here with an overlay. We show you pre-  
13 cisely how wide this coaming is and in order to see over  
14 or to see down, considering the fact as the stow plan would  
15 show there was cargo in there.

16 Now, what are you going to do, stand over here and  
17 talk to the man over there or are you going to stand some  
18 place where you are more abreast of them? This is what  
19 Mr. Iannuzzi did. Whether that ladder was there for that  
20 particular purpose or not is of no significance. I submit  
21 to you that that ladder is an invitation to anyone on that  
22 deck, if they want to see someone down below or see something  
23 down below or talk to someone down below, that they will  
24 use it. There were no signs on it to say "Do not use this  
25 ladder to look down into the hatch, use the platforms on the

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2 end. That's what they are there for."

3 With this open invitation I cannot understand  
4 any complaint with respect to the ladder being used for  
5 what it is there for. It is there to assist someone either  
6 to get on top of the hatch or from that particular location  
7 to look down. Now, we talk about -- Mr. Kain has made  
8 mention of the stow plan, yet when Captain Wheeler was  
9 on he told us that the stow plan also shows deck cargo  
10 consisting of drums at the hatch more forward and the hatch  
11 more aft. I submit, no diagram of this particular type will  
12 give you, and it does not give, the actual dimensions  
13 occupied by the cargo itself. So if Mr. Coppola or Mr.  
14 Scotto or anybody else tells you that the cargo encroached  
15 on number 3 hatch, they were there, I was not.

16 Now, Mr. Cohen has said that I had knowledge  
17 of what he suggests happened. Fine. But in preparing any  
18 lawsuit for trial what you do is talk to the people, see  
19 what the records show and you make a judgment just as you  
20 will make a judgment. Based upon that judgment you bring  
21 the action against certain persons. Okay?

22 Now, I was troubled throughout by the report or  
23 what Mr. Andre had said with respect to this accident,  
24 when all my fact witnesses place Mr. Iannuzzi on the main  
25 deck. I was puzzled and I was troubled. How could he drop

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2 something on someone at the same deck level? Now, Mr. Andre  
3 told you here that as far as he thought at the moment  
4 the accident happened -- and he acted like a reasonably  
5 sensitive individual thereafter by going to the hospital.  
6 As far as he thought immediately after the accident happened  
7 this business of him having lumber in hand and having  
8 it knocked free of his hand down into the hatch resulted  
9 in an injury to someone who was down below and he reacted  
10 accordingly and his emotional belief as to what did occur  
11 ends up in the hospital record and in Dr. Weinstein's  
12 report and everywhere else. It is the old situation of  
13 I tell you something and you repeat it to the lady next to  
14 you and you to the gentleman next to you. It changes as we  
15 hear it and it now mushrooms. This is what we have here.  
16 But does that mean that we must accept this when everything  
17 else points in this direction? Must we go this way? Now,  
18 follow this further. Mr. Kain has elected to bring ITO into  
19 this action.

20 MR. COHEN: I don't think that is any part of the  
21 issues in this case at the moment, your Honor.

22 MR. LORY: If your Honor please, there has been  
23 the counter of this brought up as to who I sued.

24 MR. COHEN: I had understood we were litigating  
25 only at the moment the issues here.

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1  
2 MR. KAIN: Your Honor, I join in the objection.  
3 I think it is totally irrelevant as to my reasons for im-  
4 pleading ITO.

5 THE COURT: The only thing you are pleading to  
6 the jury are the issues between the plaintiff and the vessel.

7 MR. LORY: If your Honor please, comment has  
8 been made as to who we brought the action against and I think  
9 I am entitled to reply with respect to the action of the other  
10 parties in the litigation. I did not open the door. The door  
11 has been opened.

12 THE COURT: Go ahead, Mr. Lory.

13 MR. LORY: As I was saying, comment has been made  
14 as to who plaintiff brought the action against. The ship  
15 owner has seen fit to bring the action against the steve-  
16 dores who were there, and I submit to you that he could also  
17 have brought the action against the carpenters, if he  
18 believed that the carpenters were involved. He did not.  
19 Today we have him joining the position of Mr. Cohen with  
20 respect to what happened here. I think this is also of  
21 significance. Mr. Kain made a judgment, just as I made a  
22 judgment, based upon the facts as we found them to be and  
23 we decided against whom to bring the action.

24 Now, Mr. Cohen -- and I am going completely out  
25 of sequence because I want to cover certain points. Mr. Cohen

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2 has made mention about the fact that the only unbiased  
3 person in the courtroom to date has been Dr. Di Maio.  
4 All right, he is unbiased. I think I am biased. I think  
5 Mr. Cohen is biased. I think Mr. Kain is biased. Each of  
6 us attorneys rightfully so. The witnesses, whether they  
7 are biased or unbiased is for your judgment, not mine. This  
8 is something that you are going to have to determine because  
9 based upon that particular little fact you will judge what-  
10 ever testimony they gave, but the mere fact that a person  
11 has some bias does not mean that he is not telling the  
12 truth. And you must also bear this in mind. The court will  
13 give you instructions as to how to treat the testimony  
14 of any witness, but let me get back to Dr. Di Maio. You  
15 have in evidence the autopsy report. As far as I know --  
16 Dr. Di Maio testified and told us here that he found no  
17 marks on Mr. Iannuzzi's body save for the injury to the  
18 skull. Now, this is rather puzzling to me because either  
19 you accept the apparent or you look further.

20 Now, the medical examiner, Dr. Di Maio, told us  
21 that there were no other marks on Mr. Iannuzzi's body. Now,  
22 bear this in mind. There were no other marks apart from  
23 the apparent surgery that he underwent. With surgery  
24 there are certain things done to an individual. There are  
25 intravenous injections and whatever. This common sense

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dictates. Did he make any mention of puncture marks?  
Did he make any mention of the state of the vital organs?  
Did he do anything except look at the apparent? With re-  
spect to what was given him, the suggestion that was given  
to him that something struck this man on the head. Now,  
this was compatible to this, just as the rest of what  
plaintiff has been putting forth in this court is compatible.  
The injuries could have resulted. He did make mention of  
a hemorrhage in the back of the head, but no contusion.  
Well, I don't know. I can only think about some of the things  
I have heard, some of the things I know. There are other  
occasions where bizarre things happen and perhaps this is  
one of them, but one thing stands out here, and that is  
if Dr. Di Maio were as thorough as he would have us believe  
there would be other notations in the hospital reports with  
respect to puncture marks and everything else. His purpose  
is to find out if further action is necessary based upon  
the history that he got. He determined that there was not,  
so, therefore, no point in going any further.

The man died from subdural hematoma from a  
fractured skull. I submit to you that the report is incomplete  
with respect to the rest of his body, regardless of what  
Dr. Di Maio said here in the court. Would he say anything  
else? You have had Mr. Cohen and Mr. Kain tell you that

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2 there was simultaneous winch failure of the entire system.  
3 This is not plaintiff's claim. What plaintiff's claim is  
4 is rather simple. We did not have to, we thought it  
5 necessary to explain to you a possibility as to what would  
6 cause the bizarre reaction of this particular winch. Every-  
7 one concedes that if I pull the handle in the raising  
8 position it would take up I think they said three foot  
9 per second. However, if it is let go out in the full posi-  
10 tion it would let out six feet per second. Now, what is  
11 necessary to cause the accident as we describe it? What is  
12 necessary is for this line to now become six feet long, or  
13 three feet long? It is now raised, and don't judge by the  
14 model because the model doesn't really have any bulwark or  
15 railing. The railing here is just about as high. It is  
16 marked on the overlays, the height of the coaming of the  
17 hatch.

18 Now, if this is six feet up above the railing  
19 and suddenly this line is lengthened twice as long as this  
20 one can take it up, what is going to happen? You are going  
21 to get a swoop. The item will go across the deck and by  
22 the same token it will drop. Now, Mr. Ferenczy tried to tell  
23 you that human reaction -- all right, we don't have to know  
24 Mr. Coppola's reaction time, but human reaction on the  
25 average individual would not permit that individual to react

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1 quickly enough to avoid the three-foot fall before he can  
2 take up or move the handle to the stopped position. If it  
3 took a second, it would have dropped six feet and six feet  
4 would have been enough to bring that car down over that deck  
5 to the point where it could come and did come in contact  
6 with Mr. Iannuzzi, throwing him into the hatch. Now, whether  
7 it hit him solid or hit him in any other fashion, I don't  
8 know. I will tell you candidly I could not establish this  
9 if I stood on my head because all I can do is try to get  
10 from witnesses what they saw as it happened in a fleeting  
11 moment. The people that came here and told you what happened  
12 in a fleeting moment to my mind were speaking the truth.

14           You will recall their testimony and I will recall  
15 in part what their testimony was. From the fact that Mr.  
16 Andre told you that he had peripheral vision, which means  
17 that you can see from the sides or you are aware of things.  
18 This is now characterized as extra sensory perception.  
19 Lawyers are entitled to comment on that which transpires  
20 during the course of the trial and what counsel do and what  
21 they don't do. Also with respect to witnesses. Extra sensory  
22 perception, what has that got to do with this? Mr. Andre  
23 told you that things about a ship during cargo operations are--  
24 shall we say they are busy. For lack of a better word they  
25 are busy, so you must be aware of what is going on and this

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1 is where your peripheral vision comes into play. He has  
2 it and that's all he intended to convey to you, not the  
3 fact that he had extra sensory perception, as has been  
4 characterized here. Forgive me for the moment, I just want  
5 to make sure. Now, what does plaintiff say failed? Plain-  
6 tiff says -- and Mr. Coppola indicated to you what he did  
7 with his hands as he operated these winches. He said  
8 that once he got this car up six and a half feet, approxi-  
9 mately, above the ship's rail, he now had to bring it across  
10 and Mr. Coppola tells us that to do this he has got to pull  
11 on this line and slacken off on this. He also told you  
12 that with respect to these controls they are not as on  
13 some type of equipment marked with points that you can feel  
14 the thing go by; you go from one segment to the other,  
15 to one segment to the other. But what you have to do is watch  
16 that draft. However you move your hands, you watch that draft  
17 because you must see. Whatever you do, whatever direction  
18 you give with the handle you must see it is reflected with  
19 that particular draft.

21 Where would you expect this man to look with  
22 respect to, as Mr. Kain had classified it, controls that  
23 react rather promptly? He has got to look at the draft.  
24 He would be concerned with the draft. I call your attention  
25 to the fact that it is also nightfall. Mr. Pitt, or was it

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Mr. Gous, told us this and that we have ship's lights.

We are not complaining about the ship's lights, but it is after nightfall and this man is looking at that particular draft, and rightfully so. Now, what did he say happened?

He said as he starts to take a strain on this and play out on this, all of a sudden this line spills out and immediately he throws the handle back into neutral to stop it.

You also have testimony, I think, from Mr. Matthee that the car ended up over here and it was standing still. I submit to you that this shows a winch man of extraordinary competence, because once that thing starts to go you can either panic or you can recover. It is like when you go into a skid with your car, you can do one of two things: let the wheel go, throw it back into neutral or try and fight it and it depends upon the individual and it also depends upon your experience. Mr. Coppola, although aspersions have been set forth here -- in fact Mr. Cohen in his summation is attacking all his employees, but be that as it may, Mr. Coppola recovered that draft, despite the fact that she dropped and despite the fact that she swooped in order to stop it over here. He told you thereafter that he removed the vehicle being more careful, or being careful with respect to when it was being removed. Now, it has been suggested to you that there are other methods

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2 of taking a man out of a hatch. So there are. I will concede  
3 this. But they took them out with this. Does that mean that  
4 the winch did not malfunction? We say no. For us to prove  
5 our case I must convince each of you by a preponderance  
6 of the evidence that we have presented that there was at  
7 least a solitary malfunction over this winch. All I need  
8 is one. If that winch malfunctioned at all then you must  
9 find the vessel unseaworthy because this bespeaks the con-  
10 dition.

11 The judge will tell you what the law is. This  
12 would be so whether the ship owner has notice of the  
13 condition or not. This is what we are talking about, a mal-  
14 function. The fact that the systems are -- we were using  
15 twowinches. All we are saying and all Mr. Ferenczy told us  
16 with respect to the diagrams was that on one side -- on  
17 the lowering side of the Burton he thought that there was a  
18 slug of air because he thought that this could produce this  
19 result. Not on the hoist side, on the lowering side. Mr.  
20 Napolitano told us that if you compress that enough, that  
21 bubble of air could pop and if it popped, what was that little  
22 gadget in this entire system that we were told about, the  
23 pilot valve? In other words, when we move that handle,  
24 all this -- all the experts tried to teach us was the fact  
25 that we have a handle which is connected to a pilot valve.

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2 There was a Servo system in between. This now is connected  
3 to the main or slave winch. Captain Wheeler came here and  
4 he told us that there was venting. Now, I am not clear  
5 what he had reference to when he said venting. Mr. Ferenczy  
6 told us that the main or slave system with that tank up  
7 in the air, that was venting. Mr. Napolitano didn't tell us  
8 that the remote system, this little thing between the  
9 handles and that pilot valve was vented, but Captain Wheeler  
10 comes in and tells us something is vented, and I wasn't going  
11 to pursue it further because I don't want to have any more  
12 fights with respect to that particular point, but in either  
13 event, the crux of this case is what happens to that particular  
14 pilot valve, because that pilot valve, its movement controls  
15 the movement of the slave; that is the entire winch system.  
16 If for whatever reason that pilot valve is compelled to go  
17 forward suddenly, even momentarily, you are going to get  
18 an extraordinary action with respect to what is on the  
19 draft because suddenly whatever is there -- and Mr. Napolitano  
20 told us this -- it is now accelerated, and I say to you this  
21 is what prompted this accident.

22 Now let me go back to what I originally wanted to  
23 tell you and what I deem to be important with respect to  
24 this case.

25 Mr. Coppola, who was the first one to testify --

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2 he testified through an interpreter and possibly something  
3 is lost in translation, I don't know. He testified that  
4 he had some difficulty with the winch, which he described  
5 as being hard. What he meant by hard I don't know. The  
6 only resistance on this particular equipment would be the  
7 strain of the springs on the pilot valve, on the control  
8 handle, on the other system that's there, the winch hydraulic  
9 motor, the receiver. All these are in a chain and in this  
10 respect that would be the resistance. However, I submit  
11 to you that as I tried to elicit or I tried to get from  
12 someone, that we have a winch control that we move in one  
13 direction back through the neutral and into the other  
14 direction, hoist, neutral and lower, and we don't do this  
15 as Mr. Coppola indicated to you with the movement of his  
16 hand, it is segmented fashion. It is done watching what  
17 the draft does. It is done with the hands continuously in  
18 movement watching the reaction with respect to the draft.  
19 Now, if there was a differential between whatever strength  
20 or resistance there was on the hoist position as opposed  
21 to any softness there may have been on the lowering position,  
22 then the man says it was hard. Now, does he mean it was  
23 difficult? Does he mean that he did not get the reaction  
24 he expected? Does he mean that he couldn't coordinate because  
25 they were not balanced in a sense? He is an experienced

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1  
2 winch man. Perhaps to a point he can compensate with this  
3 and perhaps to a point something does occur that he does not  
4 expect, as I say to you happened in this particular case.  
5 Mr. Garofalo was called. He was called -- actually my in-  
6 tention in calling Mr. Garofalo was for one express purpose,  
7 and that is he was the one who told me that he had seen  
8 the car strike Mr. Iannuzzi. Of course when you bring  
9 a witness in, they are entitled -- the other side is entitled  
10 to cross-examine and whatever other information we get we  
11 get. Mr. Garofalo told us that he saw the vehicle --- and  
12 I think he mentioned the rear tire strike Mr. Iannuzzi.  
13 He also mentioned the fact that Mr. Iannuzzi was at that  
14 particular point on the ladder and stooped over the hatch  
15 on the coaming in order to be able to look down.

16 When questions were put to Dr. Di Maio I objected  
17 because the questions placed to Dr. Di Maio would place Mr.  
18 Iannuzzi up against the coaming so if he was struck from  
19 behind of course we would have to have some injury to the  
20 forepart of the body, but Mr. Iannuzzi was leaning over that  
21 rail looking down at Mr. Garofalo.

22 Now you had Mr. Scotto. Mr. Scotto was the gangway  
23 man. He was the eyes of Mr. Coppola at the time that Mr.  
24 Coppola was being up here and looking down here and at such  
25 time as that vehicle was raised to a point that he could

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2 see it he did not need Mr. Scotto any more. You recall Mr.  
3 Kain made mention of taglines. All right, we know there  
4 was one, Captain Wheeler told us there should have been  
5 two, but we know there was only one man on the deck. Mr.  
6 Scotto told you that while he tried to grab -- and go on  
7 your recollection. I think he told you that when he tried  
8 to grab the tagline the thing moved so swiftly that all he  
9 did was duck and he mentioned the presence of drums. Now,  
10 you know that Mr. Ferenczy came here to explain to you  
11 what happened, at least as far as some plausible explanation  
12 or reasonable explanation to explain why this winch  
13 functioned in this bizarre manner. I also call your attention  
14 to certain questions that I had placed or put before  
15 Mr. Napolitano; the fact that the manual itself, the instructio  
16 manula makes mention of longtime running and Mr. Napolitano  
17 concedes this to be that longtime running of the vessel,  
18 in short as I understood his testimony, that it took a long  
19 time for the vessel to run from one port to another, and  
20 this manual, and you can take it into the jury room with you,  
21 it is in evidence-- not this copy, but the other one is,  
22 is entitled "The instruction book for electro-hydraulic  
23 deck machinery."

24 I submit to you if they mention long time running  
25 there and the fear of out of synchronization and out of

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2 synchronization result coming from longtime running, they  
3 are talking about winches, they are not talking about  
4 the vessel going from one port to the next, or the fact  
5 that the winches aren't used for a period of time or they  
6 are laid over. They are talking about use of these winches,  
7 and these winches were in use. The forward winches  
8 at number 3 hatch were in use for two days. As Mr. Kain  
9 told you, it was the last one. Now, one thing comes to mind.  
10 This document tells us that this ship was equipped with  
11 topping lift winches. Now, topping lift winches are a winch  
12 that would control this particular movement to raise and  
13 lower the boom --

14 THE COURT: Mr. Lory, would you be much longer?  
15 If you are going to be much longer we would take a break for  
16 lunch?

17 MR. LORY: May I finish this point?

18 THE COURT: All right.

19 MR. LORY: Topping lift winches are used for  
20 the pumps of raising and lowering the boom. You will recall  
21 the picture that is in evidence -- it is either A or B.  
22 You see three stanchion. The center stanchion has controls  
23 for both the port and starboard cargo winches. The two  
24 outside stanchions also have controls and they are for  
25 the topping winches. Now, while Mr. Kain tells you that

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2 the same winches were used to lower the boom he is not quite  
3 correct because a topping winch, an individual separate  
4 piece of machinery is used for topping and lowering the boom,  
5 for cromping. True the winch was used for the purpose of  
6 closing the hatch. Now, Mr. Pitt described to us accordion  
7 covers.

8 If your Honor please, I am trying to break this  
9 up with respect to argument and damages so I won't be too  
10 long.

11 We have what is known as accordion covers. These  
12 are covers that fold in a fashion like an accordion and I  
13 think in one of the pictures you can see them up against  
14 the forward part of the hatch. To get these up you have got  
15 to use winch power, and what they do is they will take  
16 a line from a cathead, or whatever they call it, on the side  
17 of the winch, wrap it around that, hook it onto the door  
18 and through pulleys and whatnot you pull and this pulls  
19 the doors back. To get them to go down all you got to do is  
20 use a little force to get them to roll, because I submit  
21 to you that the force of gravity would permit them to close,  
22 and that was the extent. Now, an inspection was made when  
23 they got to Capetown. You have heard about this. The report  
24 is not in for reasons that this court sees fit. As far as  
25 I know, there is nothing in this record to indicate, since

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2 we know that there are controls both at the slave unit and  
3 at the remote control unit, which of these particular units  
4 were used to test this winch. It could well be -- and this  
5 unknown factor is one of the reasons why -- you know nothing  
6 further of this -- they use the slave controls, the ones  
7 over by the winches themselves as opposed to the ones over  
8 on the stanchion. Now, Mr. Kain -- and I won't be much  
9 longer, your Honor --

10 MR. COHEN: I don't know where any of that is in  
11 this record, your Honor. I just don't know. Mr. Lory is  
12 the one who objected to the test report going into evidence  
13 and now he is making comments, purely speculative, about  
14 the kind of testing that was done.

15 THE COURT: Please read the last part back to me.

16 (Record read.)

17 THE COURT: Mr. Greenspan having read back to me  
18 that portion of the summation, I am not sure that any  
19 prejudice or error was caused and I would caution counsel  
20 to not refer to any exhibit that was excluded from evidence  
21 for reasons of law and, ladies and gentlemen, I rule on  
22 matters of law all through the trial on the admissibility  
23 of proof and if a man is not before you, it is not before  
24 you and it is not to be considered by you in any way and  
25 I so instruct you.

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2 MR. COHEN: Thank you, your Honor.

3 MR. LORY: I have one more point to cover, if I  
4 may, your Honor.

5 Mr. Kain, ladies and gentlemen, has mentioned  
6 to you that the pump rooms were locked. All right, so they  
7 were locked. Recall the testimony with respect to what is  
8 done or what was done and where it was done with respect  
9 to the complaints or the complaint that was made. You were  
10 told by Mr. Ferenczy that the presence of air in part of  
11 the system would cause an out of phase operation and that  
12 in order to cure this, that fluid would have to be added  
13 to the system of the particular winch that was involved.  
14 Where was this added? Where was this adjustment made?  
15 In the pump room? No. The adjustment was made at the  
16 control stanchion and there is nothing to indicate that  
17 anything was done to secure the control stand during the  
18 voyage back before anything further was done.

19 Your Honor, I have about ten minutes more. I can  
20 go on or I can conclude?

21 THE COURT: Ladies and gentlemen, we will recess until  
22 2. I am shortening the lunch hour today in that we have  
23 a long afternoon there is some likelihood. Therefore, if  
24 you could be back in the jury room at five minutes of 2  
25 so that promptly at 2 we will be able to bring you in.

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2 Gentlemen, we will stand in recess until a minute  
3 or two before 2 o'clock, please.  
4

5 (Luncheon recess.)  
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## 2 AFTERNOON SESSION

3 2 P.M.

4 THE COURT: Go ahead, sir.

5 MR. LORY: Before going on, ladies and gentlemen,  
6 I must confess that I have made an error. That error is  
7 with respect to the report of Dr. Di Maio in the autopsy  
8 report. It does include mention of the vital organs, but I  
9 submit to you that the report includes solely what is  
10 necessary to substantiate the doctor's findings as to the  
11 cause of death and the fact that there was nothing further.  
12 There was no need in that report to go into further injury,  
13 whether it be bruises and contusions, et cetera. I also  
14 remind you that Dr. Di Maio came here and told us that he  
15 found comminuted skull fractures at the top of the head  
16 of Mr. Iannuzzi, as well as the frontal and parietal regions,  
17 so they were not located solely in one particular spot.

18 Now, before going on to the element of damages,  
19 I would like to remind you of some things, and this is one  
20 of the advantages that I have over co-counsel, or adversary  
21 counsel, if you prefer, since we did have a break I had  
22 a chance to look over my notes and normally in summations  
23 you say why didn't I say this and why didn't I say that  
24 and you have a chance to forget. I had an opportunity  
25 to do this and I am going to remind you of something Mr.

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2 Ferenczy told us. He did mention the vibration characteris-  
3 tics of this particular winch. He also mentioned that the  
4 lack of synchronization would cause the winch operator to  
5 over-react and that over-reaction of the winch following  
6 the accident would be erratic, but not of the same magnitude.

7 All right, we now come to the question of con-  
8 tributory negligence, which is an important item and the  
9 court will charge you as to what this all means and what  
10 its importance is and what to do with it.

11 Now, as has been stated to you, adversary counsel  
12 are of the opinion that Mr. Iannuzzi was at fault in some  
13 way with respect to this accident. I remind you of what  
14 Mr. Wheeler told us. Early in the case when Mr. Garofalo  
15 was on he had made mention of the fact that the Safety  
16 and Health Regulations prohibited longshoremen from being  
17 or working in the plane of the draft. You heard Mr. Wheeler  
18 nere that the longshoring regulations -- which he said  
19 were minimal -- did not prohibit longshoremen from working  
20 in the plane of the draft. What he did say was the only  
21 mention of this in the regulations was the fact that wherever  
22 possible the draft should not pass over the gangway. Now,  
23 Mr. Iannuzzi at the time of this occurrence was performing  
24 his job duties with respect to loading this vessel. In  
25 the course of these duties he had to climb or communicate

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2 with someone down below and he climbed upon a little  
3 ladder that was there so that he could look down and stoop  
4 over the coaming, or lean over the coaming and look down  
5 into the hatch. I submit to you that but for the fact  
6 that this draft swooped nothing further would have happened  
7 and the fact that he was there is of no significance whatso-  
8 ever. If you take these things in sequence you will find  
9 that the plaintiff was not contributorily negligent because  
10 had the draft remained at six feet over the coaming it would  
11 not have come in contact with him and the accident would not  
12 have happened.

13 Now we get to the issue of damages. The court  
14 will instruct you as to how to treat this, but there are  
15 certain things that I have to mention to you, and I don't  
16 want to get morbid about the fact, because November 24, 1968,  
17 or November 24th per se is the birthday of both Mr. Iannuzzi  
18 and his son. Oddly enough we have a strange coincidence  
19 of the father and son being born on the same day of naturally  
20 different years. At the time Mario Iannuzzi was 42 years  
21 of age. He died on November 29, 1968, at which time he  
22 had, according to the table, a life expectancy of 29 and a  
23 half years and a work expectancy of 22.3 years. He was  
24 survived by a wife Maria, who testified here. She was  
25 age 35, having been born on March 23, 1933. He is survived

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2 also by a son Salvatore, born November 24, 1953, and at that  
3 particular time he had a minority of -- that is to age 18 --  
4 of three years. Mr. Iannuzzi was also survived by Teresa,  
5 age 10. You saw her here. She was born December 7th of  
6 1958, at which time she had an eight-year minority. Now,  
7 it is our contention that we should be awarded or they should  
8 be awarded damages. As far as the children are concerned,  
9 with respect to economic loss as well as loss of care,  
10 nurture and guidance. This means the normal family relation-  
11 ship as between parent and child and what is necessary in  
12 order to rear that child properly and instructions given  
13 by the parent and the guidance.

14           You have heard of some of what was done in this  
15 particular case with respect to the children. Also with  
16 respect to this we claim as damages, and you will have to  
17 look to the earning capacity of Mr. Iannuzzi, and I will  
18 get to this, and we have some exhibit which will help you  
19 out in this respect. Also to the funeral expenses. The  
20 funeral expenses which came to a total of \$5,306. The bills  
21 are there. They are an exhibit. Also with respect to medical  
22 expense. Counsel agreed that the sum of \$2,1972.05 was  
23 the amount of the hospital bill. We have bills here for  
24 additional nursing expenses. I counted eight of them, but  
25 I am not secure on that and I don't want to mislead you.

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2 If there are eight in number there are \$34 a day. If there  
3 are eight in number that would total 272. If there are  
4 seven in number -- I am not clear in my own mind and I don't  
5 want to stop to count them -- then you would deduct \$34  
6 from that. Now, loss of services, society and support. This  
7 is another category of damages and the court will instruct  
8 you on this as to what this means. You heard from Mrs.  
9 Iannuzzi that as far as services were concerned he did  
10 engage in work about the house and make necessary repairs.  
11 Sosciety. I will leave that to the court, apart from your  
12 common sense as to what that particular term would involve.  
13 Support we will cover. With respect to the earnings, we  
14 have a report -- well, you have the W2 forms for the years  
15 1967 and 1968 to show what he earned. We also have a  
16 report here that sets forth during those two years -- this is  
17 in evidence and you can take it with you -- the number of  
18 hours that he worked and from what I have been told this  
19 would incljde overtime hours and these are there. Also  
20 the hourly rate of pay for a longshoreman. Now, this is  
21 classified as hatch boss. Counsel have agreed to permit  
22 me to call these people to find out if it would be the  
23 same as to a regular longshoreman. You are reminded that  
24 Mr. Cohen brought out that Pier 6 closed in 1972 and the  
25 rate of pay would be the same for a regular longshoreman.

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2 My own computations have shown that during the year 1967  
3 the W2 slips would total \$13,905 and change; that in 1968,  
4 the year of this accident, over a period of 11 months Mr.  
5 Iannuzzi earned the sum of \$13,878.61. I divided 11 into  
6 that sum to get what he would have earned but for the  
7 accident for the year, so, therefore, his total earnings  
8 for that year would prospect to 15,159 in round numbers.  
9 Mr. Iannuzzi has now been dead for four and a half years.  
10 Damages have accrued up to that particular point. You will  
11 be asked to award damages for that period and for a period  
12 beyond with respect to the longevity that was expected.

13 Now, ladies and gentlemen, I can go on and make  
14 more mention of facts on my own thoughts with respect  
15 to the case, but I don't think that would serve any purpose  
16 or add or detract to it. You took an oath to consider  
17 the facts here. I am reminded solely for the moment of  
18 Mr. Andre who, when approached with respect to the fact  
19 thathe decided to come and see me that Mr. Andre readily  
20 admitted this particular fact and this court had discussed  
21 what the compensation was. You had an opportunity to see  
22 someone else who has been suggested to have been the cause  
23 of this accident, Mr. Coppola. You have a third choice  
24 with respect to the occurrence, and that is a defect in  
25 the winch itself. Please, you now have all the little parts

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1 to put the little red wagon together, and although I was  
2 told it was also a jigsaw puzzle, it is my little red wagon.  
3 Listen to the judge as to what to do with these individual  
4 parts. One thing comes to mind, and this will be the last  
5 thing that I mention and that is the fact that Mr. Scotto  
6 here told us that he saw the car strike Mr. Iannuzzi when  
7 earlier on transcript he said he did not. I remind you  
8 of Mr. Cohen's example with respect to the little old lady,  
9 or whoever it was with the wet raincoat, umbrellas or  
10 galoshes coming into your room with the blinds down and being  
11 all wet and drawing a conclusion.  
12

13 I submit to you that Mr. Scotto did the same thing  
14 here. Please, listen to the court. Follow the instructions.  
15 I apologize if I bored you during a portion of this trial  
16 with respect to reading depositions, but I have to put  
17 my case forth as I see it. I hope the trial has brought some  
18 knowledge to you and some interest to you. Use your common  
19 sense with respect to what you know. Apply the facts. Apply  
20 your knowledge in judging the demeanor and what these  
21 witnesses testified to and how you should treat it and  
22 I could ask for nothing more. Thank you very much.  
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2 THE COURT: Ladies and gentlemen of the jury,  
3 Mr. Foreman, Mr. Bostig, I want to thank you for the at-  
4 tention that I have seen you give these several days of  
5 trial to the testimony, the exhibits that have been proffered  
6 before you, and I feel from what I have observed that you  
7 are well prepared at this point to discharge your final  
8 function as jurors, which is to decide the fact issues in  
9 this case.

10 As I told you at the outset, you are the sole  
11 and exclusive judges of the facts here. It is you who will  
12 pass upon the weight of the evidence; it is you who will  
13 determine the credibility or believability of the witnesses  
14 and you will resolve such conflicts as you conclude exist  
15 in the testimony and you may draw such reasonable inferences  
16 as may be warranted by the evidence. I caution you that  
17 you may not speculate and you may not guess. Do not con-  
18 jecture.

19 I also wish to recall to your attention my state-  
20 ment that upon becoming jurors you do not leave your common  
21 sense in the hallway. That you keep with it with you at  
22 all times.

23 My function at this point is to instruct you  
24 on the law you are to apply to this particular situation  
25 given the various alternatives that have been proposed to

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2 you. It is your duty to accept these instructions and apply  
3 them to the facts as you may find them.

4 In your determination of the facts you will rely  
5 upon your own recollection of the evidence. What any attorney  
6 may have said at any time during the trial or during sum-  
7 mation, or what I may have said at any time, or what I may  
8 say during my instructions to you is not to be taken in  
9 place of your own independent recollection of what the  
10 testimony actually was. I should say that if you have any  
11 question as to that testimony, since it is your recollection  
12 that governs and you should be secure in that recollection,  
13 you may have testimony reread to you. Of course, you may  
14 ask for and receive in the jury room any exhibit that has  
15 been received in evidence.

16 As I told you just a few minutes ago before counsel  
17 began, and I think I told you at the outset of the trial  
18 as well, we are really trying two separate cases here at one  
19 time. The first one is the action brought by Mrs. Iannuzzi  
20 in a representative capacity, representing her husband's  
21 estate, and personally against the South African Marine  
22 Corporation, which is the owner of the vessel, the Huguenot,  
23 which we have heard much testimony of. It is on that vessel  
24 that Mr. Iannuzzi was working as a longshoreman on the day  
25 something happened from which he died.

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Second, in the event that it is your determination that the vessel is liable to Mrs. Iannuzzi on damages, then there is in turn the action by the -- the lawsuit by it against International Terminal Operating Company, which had been engaged by the ship owner to do the stevedoring work. You must keep in mind the separation of these cases in your determination of the issues, because the principles of law which govern the two cases are different.

First we will consider Mrs. Iannuzzi's case against the ship owner, since how you decide that issue determines whether you ever reach the ship owner's case against the stevedoring company, ITO.

I am sure you understand that a ship owner as a corporation and acts through officers or employees, mates, captains, boatswains, et cetera, and is responsible for acts committed or omitted by them in the performance of their duties.

Mrs. Iannuzzi seeks recovery of damages from the ship owner upon an ancient law of the sea known as the warranty of seaworthiness. This warrantee of seaworthiness imposes upon the owner of a vessel the duty to supply crew members, and in this case a longshoreman who is doing the work of a crew member, with a seaworthy vessel. By that is meant one reasonably fit for its intended purpose

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2 or use, or putting it another way, one reasonably adequate  
3 and fit for crew members and longshoremen in this case to  
4 discharge their functions.

5 The ship owner's duty is to provide a seaworthy  
6 vessel extends to all parts of the vessel, whether it is the  
7 holds, the deck, the working area, in this particular case  
8 the winches and their winch operating systems. This duty  
9 is a continuing one and is nondelegable. By that it is  
10 meant that it cannot be passed to anyone else. The fact  
11 that control of a vessel is turned over to independent  
12 stevedores does not relieve the ship owner of its absolute  
13 duty to provide a seaworthy vessel.

14 I made a little reference to it earlier, but Mr.  
15 Iannuzzi, as you are aware, was not a regular crew member.  
16 He was a longshoreman. In this case he was acting as a  
17 foreman and was employed by International Terminal Operating  
18 Company, which had been engaged by the ship owner to load  
19 the vessel.

20 In these circumstances, since Mr. Iannuzzi was in  
21 servicing the ship's cargo, he was performing a job on the  
22 vessel usually performed by the ship's crew and he, too,  
23 is entitled to the benefit of the warrantee of a seaworthy  
24 vessel, just as if he were a regular crew member.

25 The ship owner's duty to provide a seaworthy

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2 vessel to Mr. Iannuzzi is entirely independent of whatever  
3 duty his employer, ITO, owed to him. As I said before, the  
4 duty to supply a seaworthy vessel is an absolute duty and  
5 if the vessel fails in this duty, and as a proximate result  
6 a crew member, or in this case a longshoreman doing crew  
7 member's work is injured, then the ship owner is liable  
8 for the resulting damages.

9 This absolute liability is imposed even though  
10 the ship owner may have been free from fault and whether or  
11 not its officers knew of the defective or unseaworthy  
12 condition.

13 Liability for an unseaworthy condition does not  
14 depend in any way upon negligence, fault or blame. In short,  
15 even the exercise of reasonable care does not relieve a  
16 vessel owner from its absolute duty to those engaged in  
17 the ship's service to furnish and maintain the ship and all  
18 its parts in reasonably fit condition for intended use.

19 Bear in mind that unseaworthiness is a condition.  
20 How the condition came into being, whether by negligence or  
21 otherwise is irrelevant to the ship owner's liability. It  
22 is the fact of unseaworthiness, if you find it exists, that  
23 renders the ship owner liable. If as a proximate result  
24 a longshoreman in this case sustains injuries, and by  
25 proximate result is meant an unbroken chain of events flowing

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2 from an unseaworthy condition and leading to the injury  
3 complained of. If that chain of events flowing from any  
4 unseaworthy condition was broken by some other intervening  
5 act which caused the injury, then proximate cause between  
6 the unseaworthy condition and the injury is not established.  
7 In other words, there must be a causal connection between  
8 the alleged unseaworthiness and the injury.

9 Now, I referred to the ship owner's absolute duty  
10 to furnish a seaworthy vessel. However, I want to caution  
11 you that this does not mean that the owner was required to  
12 furnish an accident-free ship. In deciding whether a  
13 vessel is seaworthy, the standard to be applied is not  
14 absolute perfection, but reasonable fitness for intended  
15 use. Thus, the owner's duty with respect to the winches  
16 here was that they be reasonably fit for their intended  
17 purposes.

18 With these general observations on the seaworthi-  
19 ness doctrine let us consider the plaintiff's claims under  
20 that doctrine.

21 The mere fact that Mario Iannuzzi met with an  
22 accident, was injured and died does not establish unsea-  
23 worthiness or entitle him to recover. The ship owner was  
24 not an insurer of his safety. Mrs. Iannuzzi, having made  
25 a claim of damages here, has the burden of proving them, and

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2 that they were proximately caused by the accident she  
3 claims. She must establish her claims here by what the law  
4 terms a fair preponderance of the evidence. This refers  
5 to the quality of the evidence rather than the number of  
6 witnesses. It means that the evidence submitted by the  
7 plaintiff must be more persuasive and more convincing than  
8 that opposed to it. To put it in homely fashion, you must  
9 find the fact in issue that you are considering to be more  
10 likely so than not so.

11 You may say a fact is proved by a fair preponderance  
12 of the evidence when all the credible or believable evidence  
13 tends to persuade you that the witness or witnesses are telling  
14 the truth.

15 I would, however, note that just because some part  
16 of the plaintiff's proof as to this accident may not be  
17 contradicted does not compel you to accept it. For example,  
18 the mere fact that Mr. Coppola, the winch operator, testified  
19 that he did certain things with the handles does not compel  
20 you to accept that testimony. You may accept it, you may  
21 reject it, taking into account among other matters the demeanor  
22 of the man on the witness stand and the impression he made  
23 on you.

24 Now, the fact that I may use certain testimony  
25 as examples during my charge does not in any way mean that

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I have any opinion about such testimony at all. I am using it solely as an example and the weighing of it, as I have said before, is exclusively and solely in your province.

The controversy here centers about what happened to Mario Iannuzzi on the Huguenot on the 24th of November of 1968 and where the responsibility for this occurrence lies.

The plaintiff claims that there was a winch failure at the number 3 hatch, as a direct result of which her husband was knocked into the hatch by a car and suffered injuries from which he died five days later.

If you do find, as a plaintiff claims, that a winch or winches were not reasonably fit for the purposes for which they were being used, and as Mr. Coppolla testified that there was winch failure, then I charge you that you have sufficient to find an unseaworthy condition existed.

The defendant ship owner disputes the plaintiff's version as to the unseaworthy condition and he denies that any accident such as the plaintiff claims occurred. In other words, he denies that the winches were in any way unfit, or even that the winches were responsible for any accident to Mr. Iannuzzi at all.

The defendant ship owner also claims that if the accident occurred as the plaintiff claimed in this case,

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2 it was due solely and only to Mr. Iannuzzi's own fault  
3 in that he was standing in the very line of the flow of the  
4 cargo, which as an experienced longshoreman he should  
5 have known was a highly dangerous position, as Mr. Garofalo  
6 and others have testified.

7 The ship owner also contends that if the accident  
8 occurred that it in no way contributed thereto, and if you  
9 find that to be the fact that would mean that the defendant  
10 ship owner is not liable.

11 Finally, it contends that even if you find un-  
12 seaworthiness was the cause of the accident, it is the  
13 vessel's position that Mr. Iannuzzi contributed to his own  
14 injuries by his own carelessness and negligence, in which  
15 event damages must be reduced accordingly.

16 Now, I have referred only in general terms to  
17 the contentions of the plaintiff and defendant ship owner.  
18 I have not reviewed on the evidence relied on to support  
19 their respective positions in any detail, because this has  
20 been a case of relatively limited testimonial area and  
21 counsel have reviewed the testimony in their summations  
22 in detail and I feel I would be needlessly repeating that if  
23 I were to summarize it. However, you, as the triers of the  
24 fact, must review all of the evidence. All of the evidence  
25 is important, or the lack of it, as the case may be.

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2 In connection with this I charge you that the  
3 testimony given by deposition here is to be given the same  
4 weight as if the deposed witness were actually present in  
5 the courtroom and had actually testified from the stand.

6 You will consider all of the probabilities in  
7 making your determination as to whether or not the plaintiff  
8 by the weight of the credible and believable evidence has  
9 sustained her burden of proving unseaworthiness.

10 Your determination must be based upon the facts  
11 and the reasonable inferences from those facts as you find  
12 them. If upon all the evidence you find that the plaintiff  
13 has sustained her burden that a condition of unseaworthiness  
14 existed; and that such unseaworthiness was a proximate  
15 cause of the accident either in whole or in part, then the  
16 plaintiff is entitled to a recovery.

17 On the other hand, the ship owner is not liable  
18 if you find either that there was no unseaworthy condition;  
19 that is that the winches were reasonably fit and not faulty,  
20 and in this connection defendant points to the fact that  
21 the winches were used immediately subsequent to the incident,  
22 as well as referring you to certain expert and other testimony  
23 to support this conclusion. If you find that, then the ship  
24 owner is not liable.

25 If you find that the accident was due solely and

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2 only to the deceased's own negligent conduct in standing  
3 in the line of the fall, then the ship owner would not be  
4 liable.

5 Or if you find that carpenter Andre, who acted,  
6 telling two people that he had dropped lumber into the  
7 hatch -- if you conclude that he was solely responsible  
8 for this accident, the ship owner would not be liable.

9 Or if you conclude that Mr. Coppola, the winch  
10 operator, negligently operated the winch and was thereby  
11 solely responsible for the accident, then the ship owner  
12 would not be liable.

13 Should you find upon all the evidence that un-  
14 seaworthiness exists, then I charge you that the plaintiff,  
15 the deceased here did not assume the risk of working on this  
16 vessel, but I also charge you that this did not relieve him  
17 of his duty to exercise reasonable care for his own safety  
18 commensurate with all the attending circumstances, and if he  
19 failed to do so, as I said earlier, and thereby also con-  
20 tributed to the accident, this would go to a reduction of  
21 damages, as to which I will instruct you in a few minutes.

22 If upon the evidence you find that the plaintiff  
23 has sustained her burden of proof on the claim of unsea-  
24 worthiness, then, ladies and gentlemen, and only then do you  
25 reach the question of damages. If Mrs. Iannuzzi has failed

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2 to sustain her burden of proof on the claim of unseaworthi-  
3 ness, then you are to report a verdict in favor of the  
4 defendant ship owner and proceed no further. I want to  
5 clearly state that the fact that I shall instruct you on the  
6 elements of damages to be considered should not be regarded  
7 by you as any view on my part as to who was entitled to  
8 prevail, or indeed as to how you are to decide this case.  
9 That, as I have already told you, is exclusively your  
10 function.

11 Instructions as to damages are given to you for  
12 your guidance in the event if upon all the evidence you find  
13 the plaintiff is entitled to a recovery in some amount.

14 Mrs. Iannuzzi, as on the issue of damages, as  
15 on all other issues, has the burden of proof. In sum, she  
16 must establish a causal relationship between the accident  
17 caused by the alleged unseaworthiness and the claimed  
18 damages attributed thereto. The purpose of the law is to  
19 award as far as possible just and fair compensation for  
20 the loss which directly results from the accident in  
21 question.

22 Damages must be purely compensatory and reasonable  
23 and neither inadequate nor excessive. The matter rests  
24 in your sound discretion and you will be guided by your  
25 common sense and experience.

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2 Your award, should you decide plaintiff is entitled  
3 to a recovery for herself and her children, must bear a  
4 reasonable relationship to the damages suffered and those  
5 likely to be suffered in the future should you find them,  
6 and in this regard again I say to you you must not engage  
7 in speculation, guess or conjecture the same here as any-  
8 where else.

9 Now, in determining damages for the claimed  
10 wrongful death here you must look to the particular harm  
11 suffered by the dependents of the deceased, which harm  
12 includes loss of support, services and society, as well  
13 as funeral expenses. Loss of support includes all the  
14 financial contributions that the deceased would reasonably be  
15 expected to have made to his dependents had he lived for  
16 the balance of his life expectancy at the time of his injury  
17 undiminished as a result of that expectation as a result  
18 of that injury. Put another way, the plaintiff in this  
19 action, Mrs. Iannuzzi and her children for a certain period  
20 of years, should you reach the damage issue, would be  
21 entitled to recover for loss of contributions they would  
22 have received for support out of the past and out of future  
23 earnings of Mr. Iannuzzi had he lived.

24 It therefore follows that you must look to the  
25 following:

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2 1. The decedent's earning capacity. That is what  
3 he might reasonably have been expected to earn had he lived.

4 2. The extent of such earnings in which his wife,  
5 his son and his daughter might reasonably have been expected  
6 to share.

7 Loss of services includes those things that Mr.  
8 Iannuzzi performed at home or for his wife, which things  
9 you can conclude he would have continued to do but for  
10 his death.

11 Services also include the nurture, the training,  
12 the education and the guidance that his children received  
13 and would have continued to receive during their minority  
14 but for his death.

15 Loss of society embraces a broad range of mutual  
16 benefits a family member receives from another, continued  
17 existence, including love, affection, care, attention,  
18 companionship, comfort and protection.

19 In the action before you you are to consider  
20 the loss of society as I have defined it with respect to each  
21 of Mr. Iannuzzi's dependents, the children until they would  
22 reach the age of 18. Loss of society does not include,  
23 however, mental anguish or grief which represents an  
24 emotional response.

25 I further charge you that you must find damages

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2 according to date should you reach this issue, distinguishing  
3 past damages from future damages. In assessing damages  
4 you must look to the age of each individual family member  
5 and fix a sum for each. For example, his widow, his son,  
6 Salvatore, and his daughter Teressa and compensate each  
7 for the loss of support for the past and the future loss  
8 of services for the past, the future and loss of society  
9 past and in the future.

10 I charge you that Salvatore has passed the age  
11 of minority and, therefore, there would be no future  
12 damages as to him, only past, should you reach that issue.

13 The reason for separating past and future damages  
14 as the law permits interest to be paid upon accrued damages.  
15 Now, as to future damages that you might consider awarding,  
16 another rule comes into play, and that is that as to any  
17 award that you might determine should be made for future  
18 damages, you as a jury will, I am sure, recognize that  
19 you would be giving a lump sum now for the future. Therefore,  
20 the law requires you, as fact finders, to apply a discount  
21 to put into proper balance the fact that you are awarding  
22 money now in a lump sum which otherwise, under normal  
23 circumstances, would have been received in one form or  
24 another over a period of years. I therefore point out to  
25 that an appropriate discount factor or percentile is thought

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2 to be not less than 5 per cent a year under today's  
3 conditions. I mention that in case you should arrive at the  
4 point where you should wish to apply such a computation.

5 The plaintiff is also entitled to recover, as  
6 I mentioned earlier briefly, on damages for the funeral  
7 expenses incurred.

8 Now, in computing damages you are to consider  
9 that Mr. Iannuzzi was born on November 24, 1926, and was  
10 injured on November 24, 1968, at age 42 and died five  
11 days later, still at age 42. At that age, according to  
12 certain life expectancy tables, he had a life expectancy  
13 of 29½ years and he had a work expectancy of 22.3 years.

14 Now, I call to your attention the fact that these  
15 life expectancy and work expectancy tables are for your  
16 guidance only and they are not binding upon you since life  
17 expectancy and work expectancy tables reflect statistical  
18 expectancies of persons in a given age group. That is why  
19 they are not conclusive, but they are intended to be and  
20 can be usefully used as a guide in reaching a determination  
21 on these issues should you reach them. You must decide for  
22 yourselves Mr. Iannuzzi's probable life expectancy should  
23 you have occasion to consider it, and also upon the evidence  
24 you should decide his probable work expectancy.

25 Mr. Iannuzzi was survived by his wife Maria, the

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1 plaintiff here, who was born on March 3, 1933, whom he  
2 married in January of 1952. Their son Salvatore was born  
3 in November of 1953 and their daughter, Teressa, was born  
4 on December 7, 1958. At the time of this accident  
5 Salvatore was 15 and had a remaining minority of three  
6 years. His daughter Teressa was 10 and had a remaining  
7 minority of eight years, which means there is one more year  
8 to go, as I understand. That factor you can check for  
9 yourselves to be sure.  
10

11 Now, when you have computed all the damages that  
12 you find attributable to the accident, should you reach  
13 this factor, this is not necessarily the award to be made  
14 to the plaintiff. There is still the question for you to  
15 consider as to whether Mr. Iannuzzi himself contributed  
16 to the accident, and if so, how much.

17 As I have said, he was under a duty to exercise  
18 reasonable care for his own safety, to take such measures  
19 for his own safety as you would expect a reasonably prudent,  
20 experienced longshoreman to take under similar conditions.  
21 If you find that the accident was contributed to in part  
22 by his own negligent conduct, then there must be a proportion-  
23 ate reduction in the amount of damages awarded to the plain-  
24 tiff. The ship owner, as you know, has made such a con-  
25 tention and urged it upon you in addition to its other

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contentions. The plaintiff denies that her husband in any way contributed to the accident.

On the issue of contributory negligence, I charge you that the burden of proof is upon the vessel to sustain its claim by a fair preponderance of the evidence. Thus by way of example should you find that the vessel has sustained its burden and proven some contributory negligence, and that that negligence contributed to the accident, let us say 20, 30, 40 or 50 per cent as you may find, then you must reduce damages accordingly. Of course if you find that the deceased here was not negligent, you shall make no reduction whatsoever and award the total damages as you determine.

Now, so much for the plaintiff's case against the ship owner. In deciding the fact issues relevant to this and any other aspect of the case you may be called upon to decide, you are called upon to determine the credibility or believability of the witnesses, some of whom were contradicted by other witnesses and in some instances made contradictory statements themselves. In determining the credibility of each witness -- and this applies to opinion evidence given by experts as well, such as the doctor and the marine engineers, you should consider the demeanor of the witness before you, how he impressed you, his

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2 interest, if any, in the case or the parties, whether he  
3 was frank and forthright or evasive, whether there was  
4 a motive to falsify, the witness' opportunity for observa-  
5 tion as to matters that were the subject of his testimony.  
6 In short, ladies and gentlemen, in deciding whether a  
7 witness' testimony is credible or believable, what you do  
8 to use a colloquial expression is to size him up to determine  
9 whether he is reliable and trustworthy.

10 Again I urge you, use your common sense here as  
11 well as in all other aspects of your deliberations.

12 If you find that any witness wilfully testified  
13 falsely to any material fact, you may disregard the testimony  
14 of that witness in its entirety, or you may accept such  
15 part or a portion which commends itself to your belief,  
16 or which you may find is corroborated by other evidence in  
17 the case.

18 You should not be concerned -- and I know you  
19 will not be -- with who the parties are. The fact that the  
20 defendant here is a corporation must not enter into your  
21 deliberations in any way whatsoever because you are ministers  
22 of justice and justice cannot prevail if sympathy or prejudice  
23 enter into your deliberations.

24 Your oath is to render justice fairly and im-  
25 partially, without fear or favor, and to decide the fact

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2 issues solely upon the evidence in the case.

3 Each juror is entitled to his or her opinion,  
4 but you are required to exchange views with your fellow  
5 jurors. That is the very purpose of deliberation. It is  
6 your duty to discuss the evidence. If you have a point of  
7 view and if after reasoning with other jurors it appears  
8 your judgment is open to question, then, of course, you  
9 should have no hesitancy whatever in yielding your point  
10 of view. But that is only if you are convinced that the  
11 opposite point of view is really one that satisfies your  
12 own conscience and judgment. You are not to give up a  
13 point of view that you conscientiously believe in simply  
14 because you are outnumbered or outweighed.

15 I finally charge you that to return a verdict  
16 it must be a unanimous verdict of all six jurors.

17 Now, for your guidance I have prepared, together  
18 with counsel, five questions, which I am going to give  
19 to you in writing, which will be a guide to your delibera-  
20 tions. I will read them to you so that I can make a comment  
21 upon them as appropriate.

22 Question number 1. Do you find that Mrs. Iannuzzi  
23 has established her claim of unseaworthiness in the manner  
24 contended?

25 There is a place to answer that yes or no. If

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2 you answer it no, then you should report to the court and  
3 a verdict will be found in favor of the vessel. If the  
4 answer is yes, then you are to go on to the second question.

5 Question 2. If your answer to question number 1  
6 above is yes, was such unseaworthiness a proximate cause  
7 of the injury and death of the plaintiff's decedent?

8 If you answered that no, then you should likewise  
9 report to the court and deliver a verdict in favor of the  
10 defendant vessel. If your answer, however, is yes to that  
11 question, then you get to number 3.

12 3. If your answer to question 2 is yes, what is  
13 the total amount of A, past damages sustained by Mrs.  
14 Iannuzzi, Teressa and Salvatore. B. Future damages sustained  
15 by Mrs. Iannuzzi and Teressa, and you should make a finding  
16 if you reach that question in accordance with the instructions  
17 I have given you on the law of damages.

18 Question 4. Has the defendant sustained its burden  
19 of proving the decedent contributorily negligent in the  
20 manner contended?

21 There is a place there for you to answer that  
22 yes or no. If you answer that question no you should then  
23 return to the court with a verdict for the plaintiff in the  
24 amount set forth as a total of item number 3. If the  
25 answer is yes, that the defendant has sustained its burden,

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2 then you go on to question number 5, which is:

3 If your answer to 4 is yes, what degree, expressed  
4 in percentage, was the decedent contributorily negligent?  
5 You must put in there a percentage of such degree as you  
6 may find if you reach that issue, because if you do make  
7 such a finding then that, as I have charged you before,  
8 works a proportionate reduction of any damages that you may  
9 find the plaintiff is entitled to.

10 Now, with these charges to you I have concluded  
11 the charge to you on the law.

12 Gentlemen, any exceptions?

13 MR. LORY: Can we go to the side bar?

14 THE COURT: No, come into the robing room.

15 Ladies and gentlemen, we will be just a moment.  
16 We are working on matters of law.

17 (In the robing room.)

18 THE COURT: All right, Mr. Lory.

19 MR. LORY: Your Honor I believe had stated  
20 in the early part of his charge that he would later define  
21 the burden of proof required. I don't seem to recall. I  
22 could have missed it -- your defining the plaintiff's burden  
23 with respect to only by a fair preponderance.

24 THE COURT: I did at some length.

25 MR. COHEN: You did.

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MR. LORY: I will accept that, your Honor.

THE COURT: Anything else, sir?

MR. LORY: No, sir.

THE COURT: Mr. Kain?

MR. KAIN: No, your Honor, assuming, as I am, that you are only talking about the first aspect of this case, I have no objections.

THE COURT: Mr. Cohen?

MR. COHEN: I have just one complaint. Your Honor told this jury the contentions of the plaintiff and the contentions of the defendant ship owner. My contentions are rather different from those of the ship owner and your Honor seemed to take them completely out of the case and out of their consideration.

THE COURT: You are correct in that. I listed them all. I gave each and every contention I am sure.

MR. COHEN: Not mine. You specifically told them what the plaintiff's contentions were--

THE COURT: No, but I listed each of the contentions.

MR. COHEN: And then you told them what the defendant ship owner's contentions were regarding there being no defect on the winch and my contentions are-- and I summed up at length on it -- are that the winches had no

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2 part to play because Mr. Iannuzze was on the deck below  
3 and the carpenter dropped lumber on him. All I am worried  
4 about is that the fact that your Honor took pains to describe  
5 to the jury the plaintiff's contentions and then the ship  
6 owner's contentions and said nothing about mine, I fear  
7 they may be left with the impression that all I have been  
8 summing up to them about is not to play any part in their  
9 consideration of this case.

10 THE COURT: I charged that if they found no un-  
11 seaworthy condition exists, that is that the winches were  
12 reasonably fit and not faulty, and I said that defendants  
13 point to the fact that the winches were used after the  
14 accident and to the expert and other testimony, or I said  
15 if you find that the accident was due solely to the plaintiff's  
16 own conduct, and I am now paraphrasing a little bit, or  
17 if you find that carpenter Andre who acknowledged telling  
18 two people he had dropped lumber and was solely responsible  
19 for the accident, or if you find Mr. Coppola negligently  
20 operated the winch and was solely responsible for the  
21 accident, then you must find in favor of the defendant. I  
22 said all that.

23 MR. COHEN: You did say that, but earlier in your  
24 charge you went on in some elaboration of the plaintiff's  
25 contentions and the defendant ship owner's contentions.

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2 THE COURT: That is the place. That is the only  
3 place I did that.

4 MR. COHEN: No, earlier, Judge. Much earlier.

5 THE COURT: I went into the plaintiff's contentions  
6 earlier.

7 MR. COHEN: And then you went to the defendant  
8 ship owner's contentions and you said nothing about the  
9 defendant stevedore's contentions and our contentions are  
10 really different than Mr. Kain's contentions and I am  
11 only fearful of the fact that because you didn't mention  
12 them the jury may consider they are not to be considered  
13 as part of the case.

14 THE COURT: I appreciate the point that I did not  
15 mention your client in joining in the contentions. Would it  
16 be satisfactory to you if I were to advise the jury that  
17 ITO joins in all the contentions of the defendant vessel --

18 MR. COHEN: No, I don't. I never have. I said  
19 to the jury in my summation that Mr. Iannuzzi was not  
20 contributorily negligent and I said the winches had nothing  
21 to do with this case because he is on the deck below.

22 THE COURT: Which contention do you join?

23 MR. COHEN: Which contention do I join in?

24 THE COURT: What I will do, and I don't want to  
25 keep them waiting very long. If you will give me a little

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2 piece of language --

3 MR. COHEN: Could you just tell them without  
4 going into detail because I don't really want that, that  
5 they are also to consider the contentions made by the  
6 stevedore in regard to how this accident happened as part  
7 of their deliberative process or something to that effect.  
8 I don't think it necessary to go into each aspect of it.  
9 I just don't want them to feel for this part of the case  
10 they are to ignore everything I said to them.

11 THE COURT: You are also to consider the contentions  
12 of the stevedore as to how this accident happened.

13 MR. COHEN: That's about it, Judge.

14 THE COURT: I will be glad to do that.

15 MR. KAIN: If your Honor please, with respect  
16 to your Honor's directions to the jury, although I consider  
17 it highly unlikely in the context of the facts of this case,  
18 may i request your Honor with respect to -- even if they  
19 should answer the first of the specific questions in the  
20 negative, if I understood your Honor correctly, that would  
21 then conclude their deliberations and they would so report  
22 to the court.

23 THE COURT: That's right.

24 MR. KAIN: I believe, sir, that although it is  
25 highly unlikely that the jury should be required to answer

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2 the question on contributory negligence, and I have in  
3 mind, for example, that if they were to determine that  
4 the accident was caused solely by the manipulation of the  
5 winch controls as performed by Mr. Coppola, that nevertheless  
6 if the decedent contributed to this accident by standing  
7 in the plane of the falls that his contributory negligence,  
8 I would wish to argue to your Honor that this contributory  
9 negligence would entitle me to indemnity for the pro rata  
10 share of my legal fees and disbursements.

11 MR. COHEN: Judge, I think he wants the leg up  
12 on the second part of the case when you said to me earlier  
13 today we would reserve on that until after this.

14 THE COURT: This is the legal fees issue.

15 Then are we going back -- because I have no  
16 objection if it is understood that the jury -- they will  
17 then have the question put to them again on the second one.  
18 I conclude this on your Honor's instructions, if the jury  
19 were to return a negative, this would terminate the case  
20 entirely and it would seem to me at least insofar as in-  
21 demnity for damages other than legal fees and disbursements,  
22 it would require your Honor to dismiss the third party  
23 complaint?

24 THE COURT: I think so.

25 MR. KAIN: But that would still leave outstanding

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2 the situation that I pose to your Honor, at least in my  
3 opinion, and as I say I consider it highly unlikely due  
4 to the facts of this case, but assuming this to be so, I  
5 would argue to your Honor that I am still entitled because  
6 of decedent's contributory negligence in placing himself  
7 in the plane of the falls that this contributory negligence  
8 is imputable to his employer that the accident could not  
9 have occurred without it and I would thus be entitled to --

10 MR. COHEN: Wait a minute. He made a motion to  
11 sever his claim for counsel fees from this case. I opposed  
12 that position and your Honor granted it. Now he wants to  
13 bring it back into the case.

14 THE COURT: What you are saying is we may have to  
15 relitigate that issue at some future time.

16 MR. KAIN: Yes.

17 THE COURT: All right.

18 Mr. Lory, Mr. Sudler points out to me that I  
19 was using your charge as a format and I said nothing about  
20 medical expenses -- the hospital bills.

21 MR. LORY: You did not mention it.

22 THE COURT: It wasn't in the charge you gave us.

23 MR. LORY: It should have been.

24 THE COURT: It was nurses' bills and the hospital  
25 bills.

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THE COURT: I will mention that.

(In the presence of the jury.)

THE COURT: Ladies and gentlemen, I want to add two things for your consideration. One is that I want to state that you are, of course, to consider all of the contentions made by Mr. Cohen on behalf of his client in your consideration of the issues as to how this accident occurred. That is part of the submission to you, the contentions that Mr. Cohen made on behalf of his client.

Second, in connection with damages in this case, should you reach that issue, you are also to consider the nurses' bills and the hospital bills which were admitted in evidence as an exhibit in this case. No, the hospital bill as I understand it was the stipulated bills. The nurses' bills are in evidence in this case and should you reach the issue of damages, I say that those are properly allowable as damages should you find that they were proximately caused by the condition of unseaworthiness.

All right, with those remarks, ladies and gentlemen, you may retire and commence your deliberations. I thank you.

(Two alternates excused)

(Marshals sworn)

(At 3 P.M. the jury retired to commence their deliberations.)

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2 THE COURT: Will you gentlemen have your exhibits  
3 ready, and if you happen to be absent from the courtroom  
4 and could it be stipulated, that they be given to Mr.  
5 Doresand if they are requested, they be turned over.

6 MR. LORY: Yes.

7 MR. COHEN: Yes.

8 MR. KAIN: Yes.

9 MR. LORY: While I have a photograph of that  
10 board after the changes were made. May we have that marked  
11 as a court's exhibit. I think it is slightly different  
12 from the one that we have in already as Plaintiff's Exhibit  
13 14.

14 THE COURT: Any objection?

15 MR. COHEN: No.

16 THE COURT: Mark it as a plaintiff's exhibit..

xx 17 (Plaintiff's Exhibit 20 received in evidence.)

18 (Recess)

19 (At 3:25 P.M. a note was received from the jury.)

20 (Note marked as Court's Exhibit 1.)

21 (Jury present.)

22 THE COURT: Mr. Foreman, I have received a note  
23 from you reading. "Testimony by Mr. Coppola, Mr. Scotto  
24 and both technicians."

25 I do want to observe to you that that is a matter

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2 of several hours of reading. It may be-- I think it best  
3 that you discuss these matters amongst yourselves and reduce  
4 them to notes rather than having colloquy with me so I don't  
5 intrude in any way upon your deliberations, which are  
6 strictly your own, but I do want to point out that if there  
7 is some area within these witnesses that you want to focus  
8 upon, that that we could call for that and that might expedite  
9 matters, because I remember two expert witnesses were on  
10 the stand probably a good two, three hours apiece. Mr.  
11 Coppola and Mr. Scotto, who testified in part with an  
12 interpreter, was on a long time, so I want to be sure you  
13 understand what you have asked for. Do you want to retire  
14 and consider whether you want to limit this in any way?  
15 If so, I would be subject to your further request of it.

16 (At 3:41 P.M. the jury again returned to the  
17 jury room to deliberate upon a verdict.)

18 (At 3:55 P.M. a note was received from the jury.)

19 (Note marked Court's Exhibit 2.)

20 (Jury present.)

21 THE COURT: Ever since receiving your note, the  
22 second note, counsel have been looking for these items  
23 with the assistance of Mr. Greenspan. They are unable to  
24 find one of the four. In response to question number 1,  
25 "Portion of testimony from Scotto verifying that Coppola

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2 complained twice about the operation of the winches."

3 That is one that was found. Would you read that.

4 (Record read.)

5 THE COURT: The next aspect of your note concerns  
6 "Portion of Ferenczy's testimony stating that ship's  
7 winches could or could not correct themselves and portion  
8 of Ferenczy's testimony stating that once winches had acted  
9 erratically, they would probably continue to act erratically  
10 but in a different fashion. He used the word erratically  
11 as applied to air cylinder."

12 Now, I take it counsel have located--

13 MR. KAIN: We found one reference, if your Honor  
14 please, that we think may have a bearing on the question.

15 THE COURT: We found one reference, but could  
16 not find another reference.

17 Could you read, Mr. Greenspan, the one reference  
18 that you did find.

19 MR. LORY: I think I know what the other one is.

20 (Record read.)

21 THE COURT: That is the only reference that  
22 counsel has been able to find in the half hour or 45 minutes  
23 since you gave us the note. Do those readings, at least  
24 up to this point, satisfy the note, in substance?

25 All right, then you may retire and continue

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2 further deliberation.

3 (At 4:55 P.M. the jury again returned to the  
4 jury room to continue their deliberations.

5 (At 5:10 P.M. the jury returned to the courtroom.)

6 THE COURT: Ladies and gentlemen, we have received  
7 a note, which has been marked Exhibit 3 saying that you  
8 had arrived at a decision. The clerk will at this point  
9 read the special questions that I had submitted to you in  
10 writing and obtain from you your answer or answer to such  
11 of those questions as are appropriate as we go down the  
12 list.

13 THE CLERK: Question number 1. Do you find that  
14 Mrs. Iannuzzi has established her claim of unseaworthiness  
15 in the manner contended?

16 THE FOREMAN: No.

17 THE COURT: Then we go no farther. On the basis  
18 of that, then, I take it that as a matter of law -- well,  
19 if the jury would just stay in place, I will meet with  
20 counsel in the robing room. Just remain in place for a  
21 moment.

22 (In the robing room.)

23 THE COURT: I want to know what my power is to  
24 translate this finding into a verdict.

25 MR. COHEN: At this point I think it is incumbent

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2 upon you to move for the entry of judgment in favor of  
3 the defendant and against the plaintiff in view of the  
4 jury's answer on that special verdict.

5 MR. KAIN: May we also ask to have the foreman's  
6 copy marked as a corporat exhibit?

7 THE COURT: What do you want to do about your  
8 question, because Mr. Kain's question is squarely relevant  
9 at this point.

10 MR. COHEN: At this point I don't think it is.  
11 I think it is important for me to move for dismissal of  
12 Mr. Kain's claim -- that is bad, Mr. Kain's claim against  
13 my client on the grounds that faced with the two alternatives  
14 as to whether or not the accident was caused by Mr.  
15 Iannuzzi being hit by a swinging draft or whether he was  
16 down on the deck below and struck by some falling lumber,  
17 the jury has found obviously that he wasn't hit by the  
18 draft from the deck above, but was struck from lumber  
19 falling on him while he was on the deck below, because  
20 that follows in Mr. Lory's summation and the way that the  
21 issues were put to him by counsel in the summation and  
22 under those circumstances Mr. Kain is not entitled to anything  
23 from my client. It is late in the day and I am not sure  
24 if I have articulated it too well, Judge, but I think you  
25 get the thought.

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2 MR. KAIN: I submit to your Honor Mr. Cohen's  
3 conjecture may be in conformity with the actual fact,  
4 but I don't think it has any degree of a certitude. Quite  
5 frankly, in order to do so, I would suggest that the jury  
6 be asked to answer the question on contributory negligence,  
7 unless there is some objection.

8 MR. COHEN: There is. We didn't sum up to the  
9 jury on the issues involved in the claim over, of which  
10 contributory negligence is only one, and it was expressly  
11 understood that we would go back to the jury, if necessary;  
12 we would have further summations and further charge on that  
13 issue. Now, Mr. Kain wants to circumvent all of that and  
14 just take an isolated finding out of context and without  
15 summations and use that as a basis for then claiming in-  
16 demnity, completely circumventing my demand in the pleadings  
17 for trial by jury on that issue. Now, we never summed up  
18 on it. I think if he wants to press this claim, if your  
19 Honor doesn't dismiss it and he wants to press it, we should  
20 now have the opportunity to go back to this injury and sum  
21 up on the claim over, your Honor charge the jury on the  
22 issues involved in the claim over and take a verdict on  
23 the claim over. It seems to me very clear in the context  
24 in which this case was tried they found that Mr. Iannuzzi  
25 was struck by the lumber that Andre dropped and in that

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2 context he is not entitled to anything. I think in that  
3 context I am entitled to some recovery against him for my  
4 expenses in defending this case.

5 THE COURT: I don't know that I need to give  
6 them a charge. It is just a question of them making the  
7 determination of what the fact is and the conclusion flows  
8 from their determination.

9 MR. KAIN: If your Honor please, perhaps this  
10 would solve it to Mr. Cohen's satisfaction. I am willing  
11 to agree with Mr. Cohen, if it is agreeable to your Honor,  
12 that we permit the court to determine the rest of this on  
13 the basis of a non-jury determination by your Honor and  
14 I submit that in so doing, as long as your Honor's finding  
15 is not contra to the jury's -- in other words, not at odds  
16 with the finding of the jury, that your Honor is free to  
17 adopt Mr. Cohen's suggestion that this is the way the trial--  
18 and your Honor is free to do anything that is not in-  
19 consistent with this jury's finding. I am aware that  
20 in doing this -- I am leaving this in effect to your Honor's  
21 feeling on this, but I have some trepidation and Mr. Cohen's  
22 office if not Mr. Cohen -- we have a case on appeal now  
23 where somebody made the mistake of asking a jury one question  
24 too many and it is now in the Court of Appeals. If this is  
25 agreeable with Mr. Cohen, it is agreeable to me. The only

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2 reason I raise this, and I quite frankly say, your Honor,  
3 I am reluctant to do this, but I consider it to be part  
4 of my duty to my client to raise it as an issue, and if  
5 Mr. Cohen is agreeable, I am willing to abide by your Honor's  
6 decision and your Honor's determination on this point,  
7 which as I say, as long as it is not inconsistent with the  
8 jury's finding as I understand it your Honor can make  
9 any ruling any way he wishes that is not inconsistent.  
10 In other words, you could not reverse it, of course, and find  
11 that there was an unseaworthy condition, but I assume your  
12 Honor having heard the testimony and summations, your Honor  
13 is free to rule in any fashion he so desires, assuming  
14 this is acceptable to Mr. Cohen and a determination of  
15 the third party suit.

16 MR. COHEN: The problem is my feeling -- to be  
17 very candid about this, my feeling is that this jury has  
18 resolved that the accident happened by Andre dropping the  
19 lumber on Mr. Iannuzzi and I think if we had a chance to  
20 present that to them, with a few words of summation on it,  
21 I think we would find out that that was certainly their  
22 feeling.

23 MR. KAIN: I have great trepidation about that.

24 MR. COHEN: I see no reason why judgment should  
25 not be entered right now in favor of the defendant and

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2 against the plaintiff on the main claim based upon the  
3 answer we received from the jury. I just hate to substitute  
4 at this juncture the finder of the facts when I think that  
5 the jury as the present finder of the facts has found the  
6 facts in the fashion that would enure to my client's benefit.  
7 I think your Honor probably would, too, but I am not sure.

8 THE COURT: At this point I don't dare speak.

9 I think what we would have to do is ask this jury  
10 to come back in the morning, unless you are prepared to  
11 sum up to them, because it is 5:20.

12 MR. KAIN: May I step out with Mr. Cohen, your  
13 Honor, and see if we can reach some agreement?

14 (Discussion off the record.)

15 MR. COHEN: He has convinced me to go along with  
16 his suggestion.

17 THE COURT: In other words, to submit to me  
18 the issue of how the accident in fact happened?

19 MR. COHEN: And whether indemnity --

20 THE COURT: Whether indemnity follows from that.

21 MR. COHEN: That's right.

22 MR. KAIN: May I submit to your Honor that as  
23 far as defendant is concerned, I think your Honor has heard  
24 about as much testimony as your Honor probably wishes to  
25 hear on this point and if your Honor agrees with Mr. Cohen,

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2 I think your Honor can, under the terms of our stipulation,  
3 so rule in Mr. Cohen's favor at this time. If your Honor  
4 does not, of course, I would not urge your Honor to.

5 THE COURT: I don't have to rule tonight on this.

6 MR. KAIN: That is quite true.

7 MR. COHEN: I just tell you that we never closed  
8 our case. They could go on ad infinitum. There are always  
9 loose ends.

10 THE COURT: Is there anything that would be open  
11 in the event that Mr. Lory would take an appeal? Does that  
12 keep the issue open against you in any way?

13 MR. KAIN: I don't think so. I would assume --  
14 well, for one thing, no, Mr. Lory, there is no way he  
15 could get his appeal on before the fall and I assume your  
16 Honor would give us some indication of your Honor's feeling  
17 of the subject before then.

18 THE COURT: In other words, what you are saying  
19 to me is you would like me to rule this very minute.

20 MR. COHEN: No.

21 MR. KAIN: It doesn't have to be at this minute.

22 MR. COHEN: But within the reasonably near future.

23 THE COURT: I would be prepared to do that.

24 Then you are going to submit to me the question  
25 of the cause of the accident for the purpose of your

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2 indemnity claim?

3 MR. COHEN: Right.

4 MR. KAIN: In terms of evidence, speaking for  
5 myself, and I conclude this to be true for Mr. Cohen, I  
6 don't think there is any additional evidence as I understand,  
7 we are in effect asking your Honor to be the arbiter of  
8 this contention between Mr. Cohen and ourselves and I  
9 assume, as I said before, that as long as your Honor's  
10 ruling is not inconsistent with this jury's finding--

11 MR. COHEN: It can't be. No matter what his  
12 Honor decides, it can't be.

13 THE COURT: I will accept that responsibility.

14 Now, let's see what we do with this jury to  
15 turn this special question into a verdict that is proper  
16 in form and substance so we have no problem.

17 MR. COHEN: I think this is it. I don't think anything  
18 more need be done.

19 MR. KAIN: I think the defendants at this time  
20 should move -- since I am the party defendant, I should move  
21 to enter judgment on this jury's verdict.

22 MR. COHEN: Yes.

23 THE COURT: You mean here in this robing room?

24 MR. KAIN: I so move.

25 THE COURT: On the law I grant that motion.

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2 I can now discharge the jury with my thanks  
3 and tell them to go.

4 MR. LORY: I want the jury polled, your Honor.

5 (In the presence of the jury.)

6 THE COURT: Mr. Bostik, had you made a notation  
7 on the special questions of your answer to that first  
8 question? Had you written on it or did you answer it  
9 orally?

10 THE FOREMAN: I put a check mark.

11 THE COURT: All right, could we mark that as  
12 Court's Exhibit 4.

13 (Notes marked Court's Exhibits 3 and 4.)

14 THE COURT: Mr. Lory, you would like the jury  
15 polled?

16 MR. LORY: Yes, please.

17 THE COURT: Mr. Dorset will ask each of you in-  
18 dividually if that is your verdict.

19 (Each juror, upon being asked by the clerk "Is  
20 that your verdict?" answered in the affirmative.)

21 THE COURT: Ladies and gentlemen, there has been  
22 a motion to enter judgment for the defendant vessel upon  
23 your finding of a failure to establish a claim of un-  
24 seaworthiness and I have granted judgment for the defendant  
25 vessel based upon that finding.

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2 Before discharging you, I want to thank you  
3 for the careful attention that has been given to this case  
4 over what is now two weeks and I appreciate your attendance,  
5 consideration of the issues and you are discharged with  
6 my thanks.

7 MR. COHEN: May we all thank the jury for their  
8 time and attendance, your Honor?

9 THE COURT: I am sure that you may and you have  
10 my permission to do so.

11 (Jury excused)

12 MR. LORY: If your Honor please, at this time  
13 I respectfully move the court to grant plaintiffs a new  
14 trial on the grounds that the jury findings does not conform  
15 with the proof.

16 THE COURT: In what regard?

17 MR. LORY: With respect to the issue of unsea-  
18 worthiness, your Honor, there has been --

19 THE COURT: The issue of unseaworthiness?

20 MR. LORY: Yes, your Honor. We had shown the  
21 physical effects of a defect in the winch, which has been  
22 presented to this jury. There has been no testimony, or  
23 there is nothing in the record to indicate that the winch  
24 did not or could not react in this particular fashion. We  
25 have placed the plaintiff on the main deck, and if the jury

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2 considered the statements made or the allegations made,  
3 or the suggestions made with respect to the falling of  
4 lumber upon the person of Mr. Iannuzzi, I submit to your  
5 Honor that it would be impossible because no one has placed  
6 him in the tween deck. He has been throughout this trial  
7 upon the evidence presented, and upon all the fact witnesses  
8 that were called and testified on the main deck, which would  
9 make the alternate theory advanced by counsel here with  
10 respect to lumber being dropped on his head impossible  
11 and impractical. A man cannot be struck on the head if  
12 he is at the same level, and this was an alternate theory  
13 which was offered here, and I think based upon the evidence  
14 in the case it has not been established and this is, I  
15 think, fundamental to the motion. It has not been established  
16 that Mr. Iannuzzi was elsewhere except on the main deck.

17 THE COURT: Mr. Lory, on the record that this  
18 jury had to consider, I find that there was a very sharp  
19 issue of fact on the question of seaworthiness, which is  
20 the issues that they decided the case upon. The testimony  
21 of the winch operator was such that one could have concluded  
22 from the fact that the winch continued to be used that there  
23 was in fact nothing wrong with it. The testimony of the  
24 marine engineer for the vessel was clearly testimony from  
25 which the jury could have concluded that there was nothing

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2 wrong with the winch, and in my judgment the testimony  
3 of the expert witness for the plaintiff was frankly only  
4 marginally sufficient to get the case to the jury on that  
5 issue. Therefore, I conclude that the jury had more than  
6 enough before it to warrant a finding of seaworthiness  
7 as far as the winches were concerned, which is the only  
8 issue.

9 Further, I think that on the entire record, the  
10 jury could have made a finding that Mr. Iannuzzi was in  
11 fact in the tween decks or they could have made a number  
12 of other findings, all of which are consistent with the  
13 fact that this was a seaworthy vessel, and, therefore,  
14 I deny the motion.

15 MR. LORY: Thank you, your Honor.

16 ----  
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25

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

MARIA IANNUZZI, as Administratrix  
of Estate of MARIO IANNUZZI,  
Deceased,

Plaintiff,

-against-

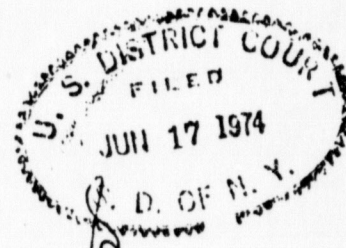
SOUTH AFRICAN MARINE CORPORATION  
LTD.,

Defendant and Third Party  
Plaintiff,

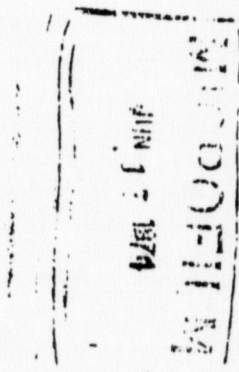
-against-

INTERNATIONAL TERMINAL OPERATING  
CO., INC.,

Third Party Defendant.



69 Civ. 2829



MEMORANDUM AND ORDER

In the action of the plaintiff for the wrongful death of her husband longshoreman Mario Iannuzzi, I dismissed the negligence claim on the law and the jury returned a verdict for defendant vessel, finding no unseaworthiness. Subsequent to the verdict, defendant and third-party defendant, International Terminal Operating Co., agreed to have the determination of

Memorandum and Order

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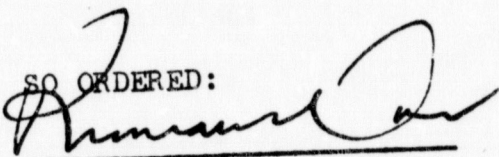
the remaining claims of breach of warranty (upon which evidence was also submitted at trial) determined by the Court, provided the Court's findings were not inconsistent with the jury's verdict in the main cause of action.

Having carefully considered the trial record, I find by a clear preponderance of the evidence that the sole cause of Iannuzzi's death was a piece of lumber dropped upon him by one Andre, a carpenter employed by New Jersey Export Marine Carpenters.

Therefore, there being no breach of warranty by either the defendant or the third-party defendant, I dismiss their respective causes of action without costs or disbursements.

New York, N.Y.  
June 12, 1974.

SO ORDERED:

  
U. S. D. J.

## US COURT OF APPEALS: SECOND CIRCUIT

IANUZZI,

Plaintiff-Appellant,

against

MARINE CORP.,

Defendant and Third Party Plaintiff-Appellee.

Indsz No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

I, Victor Ortega,

being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

1027 Avenue St. John, Bronx, New York

That on the 31st day of October 1974 at \*

deponent served the annexed

*Joint Appendix*

upon

\*

the

in this action by delivering <sup>2</sup> <sup>ies</sup> true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein,Sworn to before me, this 31st  
day of October October 19 74*Victor Ortega*  
Print name beneath signature

VICTOR ORTEGA

*Robert T. Brin*  
ROBERT T. BRIN  
NOTARY PUBLIC, STATE OF NEW YORK  
NO. 31 - 0418950  
QUALIFIED IN NEW YORK COUNTY  
COMMISSION EXPIRES MARCH 30, 1975\* Haight, Gardner, Poor & Havens  
1 State Street Plaza, New York\* Alexander, Ash, Schwartz & Cohen  
801 Second Ave., New York